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Energy

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PARTS 200 TO 399

Revised as of January 1, 1986

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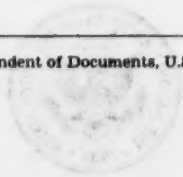


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thus: 10 CFR 202.21

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Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, January 1, 1986), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

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Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a

date certain for expiration, an appropriate note will be inserted following the text.

OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled **CFR INDEX AND FINDING AIDS**. This volume contains the Parallel Table of Statutory Authorities and Agency Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

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For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, D.C. 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 (telephone 202-783-3238).

JOHN E. BYRNE,

Director,

Office of the Federal Register.

January 1, 1986.

THIS TITLE

Title 10—ENERGY is composed of four volumes. The first volume, Parts 0-199, contains the regulations of the Nuclear Regulatory Commission (Chapter I). The second, third and fourth volumes, Parts 200-399, 400-499 and Part 500-End, contain the regulations and rulings of the Department of Energy (Chapters II, III and X). The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 1986.

For this volume, Ernie Sowada was Chief Editor. The Code of Federal Regulations publications program is under the direction of Martha B. Girard, assisted by Robert E. Jordan.

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Title 10—Energy

(This book contains Parts 200 to 399)

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Title 10—Energy

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CHAPTER II—DEPARTMENT OF ENERGY

SUBCHAPTER A—OIL

EDITORIAL NOTE: At 46 FR 20512, Apr. 3, 1981, several sections of the Department of Energy regulations were removed from this subchapter. Numerous references to the removed sections exist in the text of the remaining regulations. Any inquiries regarding these cross-references should be directed to the Department of Energy.

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PART 202—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

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- 202.22 Production or disclosure prohibited unless approved by appropriate DOE official.
- 202.23 Procedure in the event of a demand for production or disclosure.
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- 202.25 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.
- 202.26 Procedure in the event of an adverse ruling.

AUTHORITY: Freedom of Information Act, 5 U.S.C. 552; Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159; Federal Energy Administration Act of 1974, Pub. L. 93-275, E.O. 11790, 39 FR 23185, unless otherwise noted.

Subpart A—[Reserved]

Subpart B—Production or Disclosure in Response to Subpoenas or Demands of Courts or Other Authorities

SOURCE: 39 FR 35472, Mar. 13, 1974, unless otherwise noted.

§ 202.21 Purpose and scope.

(a) This subpart sets forth the procedures to be followed when a subpoena, order, or other demand (hereinafter referred to as a "demand") of a court or other authority is issued for the production or disclosure of (1) any material contained in the files of the Department of Energy (DOE), (2) any information relating to material contained in the files of the DOE, or (3) any information or material acquired by any person while such person was an employee of the DOE as a part of

the performance of his official duties or because of his official status.

(b) For purposes of this subpart, the term "Employee of the DOE" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of, the Administrator of DOE.

§ 202.22 Production or disclosure prohibited unless approved by appropriate DOE official.

No employee or former employee of the DOE shall, in response to a demand of a court or other authority, produce any material contained in the file of the DOE or disclose any information relating to material contained in the files of the DOE, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the General Counsel of DOE.

§ 202.23 Procedure in the event of a demand for production or disclosure.

(a) Whenever a demand is made upon an employee or former employee of the DOE for the production of material or the disclosure of information described in § 202.21(a), he shall immediately notify the Regional Counsel for the region where the issuing authority is located. The Regional Counsel shall immediately request instructions from the General Counsel of DOE.

(b) If oral testimony is sought by the demand, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or his attorney, setting forth a summary of the testimony desired, must be furnished for submission by the Regional Counsel to the General Counsel.

§ 202.24 Final action by the appropriate DOE official.

If the General Counsel approves a demand for the production of material or disclosure of information, he shall so notify the Regional Counsel and such other persons as circumstances may warrant.

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§ 202.25 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.

If response to the demand is required before the instructions from the General Counsel are received, a U.S. attorney or DOE attorney designated for the purpose shall appear with the employee or former employee of the DOE upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate DOE official and shall respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

§ 202.26 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with § 202.25 pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand. "United States ex rel Touhy v. Ragen," 340 U.S. 462.

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AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159; Federal Energy Administration Act of 1974, Pub. L. 93-275 (88 Stat. 96; E.O. 11790, 39 FR 23185), unless otherwise noted.

SOURCE: 39 FR 35489, Oct. 1, 1974, unless otherwise noted.

EDITORIAL NOTE: Regulations in this part are affected by a document published at 44 FR 37938, June 29, 1979. See the redesignation table appearing in the Finding Aids section of this volume.

Subpart A—General Provisions

§ 205.1 Purpose and scope.

This part establishes the procedures to be utilized and identifies the sanctions that are available in proceedings before the Department of Energy and State Offices, in accordance with Parts 209 through 214 of this chapter.

§ 205.2

[41 FR 36647, Aug. 31, 1976]

§ 205.2 Definitions.

The definitions set forth in other parts of this chapter shall apply to this part, unless otherwise provided. In addition, as used in this part, the term:

"Action" means an order, interpretation, notice of probable violation or ruling issued, or a rulemaking undertaken by the DOE or, as appropriate, by a State Office.

"Adjustment" means a modification of the base period volume or other measure of allocation entitlement in accordance with Part 211 of this chapter.

"Aggrieved", for purposes of administrative proceedings, describes and means a person with an interest sought to be protected under the FEAA, EPAA, or Proclamation No. 3279, as amended, who is adversely affected by an order or interpretation issued by the DOE or a State Office.

"Appropriate Regional Office or appropriate State Office" means the office located in the State or DOE region in which the product will be physically delivered.

"Assignment" means an action designating that an authorized purchaser be supplied at a specified entitlement level by a specified supplier.

"Conference" means an informal meeting, incident to any proceeding, between DOE or State officials and any person aggrieved by that proceeding.

"Consent order" means a document of agreement between DOE and a person prohibiting certain acts, requiring the performance of specific acts or including any acts which DOE could prohibit or require pursuant to § 205.195.

"Duly authorized representative" means a person who has been designated to appear before the DOE or a State Office in connection with a proceeding on behalf of a person interested in or aggrieved by that proceeding. Such appearance may consist of the submission of applications, petitions, requests, statements, memoranda of law, other documents, or of a personal appearance, verbal communication, or

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any other participation in the proceeding.

"EPAA" means the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93-159).

"EPCA" means the Energy Policy and Conservation Act (Pub. L. 94-163).

"Exception" means the waiver or modification of the requirements of a regulation, ruling or generally applicable requirement under a specific set of facts.

"Exemption" means the release from the obligation to comply with any part or parts, or any subpart thereof, of this chapter.

"DOE" means the Department of Energy, created by the FEAA and includes the DOE National Office and Regional Offices.

"FEAA" means the Federal Energy Administration Act of 1974 (Pub. L. 93-275).

"Federal legal holiday" means New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day appointed as a national holiday by the President or the Congress of the United States.

"Interpretation" means a written statement issued by the General Counsel or his delegate or Regional Counsel, in response to a written request, that applies the regulations, rulings, and other precedents previously issued, to the particular facts of a prospective or completed act or transaction.

"Notice of probable violation" means a written statement issued to a person by the DOE that states one or more alleged violations of the provisions of this chapter or any order issued pursuant thereto.

"Order" means a written directive or verbal communication of a written directive, if promptly confirmed in writing, issued by the DOE or a State Office. It may be issued in response to an application, petition or request for DOE action or in response to an appeal from an order, or it may be a remedial order or other directive issued by the DOE or a State Office on its own initiative. A notice of probable violation is not an order. For purposes of this definition a "written di-

rective" shall include telegrams, telecopies and similar transcriptions.

"Person" means any individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a charitable, educational or other institution, and includes any officer, director, owner or duly authorized representative thereof.

"Proceeding" means the process and activity, and any part thereof, instituted by the DOE or a State Office, either on its own initiative or in response to an application, complaint, petition or request submitted by a person, that may lead to an action by the DOE or a State Office.

"Remedial order" means a directive issued by the DOE requiring a person to cease a violation or to eliminate or to compensate for the effects of a violation, or both.

"Ruling" means an official interpretative statement of general applicability issued by the DOE General Counsel and published in the FEDERAL REGISTER that applies the DOE regulations to a specific set of circumstances.

"State Office" means a State Office of Petroleum Allocation certified by the DOE upon application pursuant to Part 211 of this chapter.

Throughout this part the use of a word or term in the singular shall include the plural and the use of the male gender shall include the female gender.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267)

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36555, Aug. 21, 1975; 40 FR 36761, Aug. 22, 1975; 41 FR 36647, Aug. 31, 1976; 43 FR 14437, Apr. 6, 1978]

§ 205.3 Appearance before the DOE or a State Office.

(a) A person may make an appearance, including personal appearances in the discretion of the DOE, and participate in any proceeding described in

this part on his own behalf or by a duly authorized representative. Any application, appeal, petition, request or complaint filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless a DOE form requires otherwise. Falsification of such certification will subject such person to the sanctions stated in 18 U.S.C. 1001 (1970).

(b) Suspension and disqualification: The DOE or a State Office may deny, temporarily or permanently, the privilege of participating in proceedings, including oral presentation, to any individual who is found by the DOE—

(1) To have made false or misleading statements, either verbally or in writing;

(2) To have filed false or materially altered documents, affidavits or other writings;

(3) To lack the specific authority to represent the person seeking a DOE or State Office action; or

(4) To have engaged in or to be engaged in contumacious conduct that substantially disrupts a proceeding.

§ 205.4 Filing of documents.

(a) Any document, including, but not limited to, an application, request, complaint, petition and other documents submitted in connection therewith, filed with the DOE or a State Office under this chapter is considered to be filed when it has been received by the DOE National Office, a Regional Office or a State Office. Documents transmitted to the DOE must be addressed as required by § 205.12. All documents and exhibits submitted become part of an DOE or a State Office file and will not be returned.

(b) Notwithstanding the provisions of paragraph (a) of this section, an appeal, a response to a denial of an appeal or application for modification or rescission in accordance with §§ 205.106(a)(3) and 205.135(a)(3), respectively, a reply to a notice of probable violation, the appeal of a remedial order or remedial order for immediate compliance, a response to denial of a claim of confidentiality, or a comment submitted in connection with any pro-

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ceeding transmitted by registered or certified mail and addressed to the appropriate office is considered to be filed upon mailing.

(c) Hand-delivered documents to be filed with the Office of Exceptions and Appeals shall be submitted to Room 8002 at 2000 M Street, NW., Washington, D.C. All other hand-delivered documents to be filed with the DOE National Office shall be submitted to the Executive Secretariat at 12th and Pennsylvania Avenue, NW., Washington, D.C. Hand-delivered documents to be filed with a Regional Office shall be submitted to the Office of the Regional Administrator. Hand-delivered documents to be filed with a State Office shall be submitted to the office of the chief executive officer of such office.

(d) Documents received after regular business hours are deemed filed on the next regular business day. Regular business hours for the DOE National Office are 8 a.m. to 4:30 p.m. Regular business hours for a Regional Office or a State Office shall be established independently by each.

§ 205.5 Computation of time.

(a) *Days.* (1) Except as provided in paragraph (b) of this section, in computing any period of time prescribed or allowed by these regulations or by an order of the DOE or a State Office, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or Federal legal holiday in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor a Federal legal holiday.

(2) Saturdays, Sundays or intervening Federal legal holidays shall be excluded from the computation of time when the period of time allowed or prescribed is 7 days or less.

(b) *Hours.* If the period of time prescribed in an order issued by the DOE or a State Office is stated in hours rather than days, the period of time shall begin to run upon actual notice of such order, whether by verbal or written communication, to the person directly affected, and shall run with-

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out interruption, unless otherwise provided in the order, or unless the order is stayed, modified, suspended or rescinded. When a written order is transmitted by verbal communication, the written order shall be served as soon thereafter as is feasible.

(c) *Additional time after service by mail.* Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time after issuance to such person of an order, notice, interpretation or other document and the order, notice, interpretation or other document is served by mail, 3 days shall be added to the prescribed period.

§ 205.6 Extension of time.

When a document is required to be filed within a prescribed time, an extension of time to file may be granted by the office with which the document is required to be filed upon good cause shown.

§ 205.7 Service.

(a) All orders, notices, interpretations or other documents required to be served under this part shall be served personally or by registered or certified mail or by regular United States mail (only when service is effected by the DOE or a State Office), except as otherwise provided.

(b) Service upon a person's duly authorized representative shall constitute service upon that person.

(c) Service by registered or certified mail is complete upon mailing. Official United States Postal Service receipts from such registered or certified mailing shall constitute *prima facie* evidence of service.

§ 205.8 Subpoenas, special report orders, oaths, witnesses.

(a) In this section the following terms have the definitions indicated unless otherwise provided.

(1) "DOE Official" means the Secretary of the Department of Energy, the Administrator of the Economic Regulatory Administration, the Administrator of Energy Information Administration, the General Counsel of the Department of Energy, the Special Coun-

sel for Compliance, the Assistant Administrator for Enforcement, the Director of the Office of Hearings and Appeals, or the duly authorized delegate of any of the foregoing officials.

(2) "SRO" means a Special Report Order issued pursuant to paragraph (b) of this section.

(b) (1) In accordance with the provisions of this section and as otherwise authorized by law, a DOE Official may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person. Unless otherwise provided by Subpart O, the provisions of this section apply to subpoenas issued by the office of Hearings and Appeals with respect to matters in proceedings before it.

(2) A DOE Official may issue a Special Report Order requiring any person subject to the jurisdiction of the ERA to file a special report providing information relating to DOE regulations, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required by this chapter.

(3) The DOE Official who issues a subpoena or SRO pursuant to this section, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(4) Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the subpoena or SRO, the person upon whom the document was served may file a request for review of the subpoena or SRO with the DOE Official who issued the document. The DOE Official then shall forward the request to his supervisor who shall provide notice of receipt to the person requesting review. The supervisor or his designee may extend the time prescribed for

compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(5) If the subpoena or SRO is not modified or rescinded within 10 days of the date of the supervisor's notice of receipt, (i) the subpoena or SRO shall be effective as issued; and (ii) the person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the supervisor's notice of receipt, unless otherwise notified in writing by the supervisor or his designee.

(6) There is no administrative appeal of a subpoena or SRO.

(c) (1) A subpoena or SRO shall be served upon a person named in the document by delivering a copy of the document to the person named.

(2) Delivery of a copy of the document to a natural person may be made by:

(i) Handing it to the person;

(ii) Leaving it at the person's office with the person in charge of the office;

(iii) Leaving it at the person's dwelling or usual place of abode with a person of suitable age and discretion who resides there;

(iv) Mailing it to the person by registered or certified mail, at his last known address; or

(v) Any method that provides the person with actual notice prior to the return date of the document.

(3) Delivery of a copy of the document to a person who is not a natural person may be made by:

(i) Handing it to a registered agent of the person;

(ii) Handing it to any officer, director, or agent in charge of any office of such person;

(iii) Mailing it to the last known address of any registered agent, officer, director, or agent in charge of any office of the person by registered or certified mail, or

(iv) Any method that provides any registered agent, officer, director, or agent in charge of any office of the person with actual notice of the document prior to the return date of the document.

(d)(1) A witness subpoenaed by the DOE shall be paid the same fees and

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mileage as paid to a witness in the district courts of the United States.

(2) If in the course of a proceeding conducted pursuant to Subpart M or O, a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage shall be paid by the DOE if the person shows:

(i) The presence of the subpoenaed witness will materially advance the proceeding; and

(ii) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage. The DOE Official issuing the subpoena shall make the determination required by this subsection.

(e) If any person upon whom a subpoena or SRO is served pursuant to this section, refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the United States District Court to enforce the subpoena or SRO.

(f) (1) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that (i) a diligent search has been made for each document responsive to the subpoena, and (ii) to the best of his knowledge, information, and belief each document responsive to the subpoena is being produced unless withheld on the grounds of privilege pursuant to paragraph (g) of this section.

(2) Any information furnished in response to an SRO shall be accompanied by the sworn certification under penalty of perjury of the person to whom it was directed or his authorized agent who actually provides the information that (i) a diligent effort has been made to provide all information required by the SRO, and (ii) all information furnished is true, complete, and correct unless withheld on grounds of privilege pursuant to paragraph (g) of this section.

(3) If any document responsive to a subpoena is not produced or any infor-

mation required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO.

(g) If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the certification required by paragraph (f) of this section also shall submit a written list of the documents or the information withheld indicating a description of each document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, and an identification of the person whose privilege is being asserted.

(h)(1) If testimony is taken pursuant to a subpoena, the DOE Official shall determine whether the testimony shall be recorded and the means by which the testimony is recorded.

(2) A witness whose testimony is recorded may procure a copy of his testimony by making a written request for a copy and paying the appropriate fees. However, the DOE official may deny the request for good cause. Upon proper identification, any witness or his attorney has the right to inspect the official transcript of the witness' own testimony.

(i) The DOE Official may sequester any person subpoenaed to furnish documents or give testimony. Unless permitted by the DOE Official, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(j)(1) Any witness whose testimony is taken may be accompanied, represented and advised by his attorney as follows:

(i) Upon the initiative of the attorney or witness, the attorney may advise his client, in confidence, with respect to the question asked his client, and if the witness refuses to answer any question, the witness or his attorney is required to briefly state the legal grounds for such refusal; and

(ii) If the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(k) The DOE Official shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. DOE may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46287) [44 FR 23201, Apr. 19, 1979]

§ 205.9 General filing requirements.

(a) *Purpose and scope.* The provisions of this section shall apply to all documents required or permitted to be filed with the DOE or with a State Office.

(b) *Signing.* All applications, petitions, requests, appeals, comments or any other documents that are required to be signed, shall be signed by the person filing the document or a duly authorized representative. Any application, appeal, petition, request, complaint or other document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless an DOE form otherwise requires. (A false certification is unlawful under the provisions of 18 U.S.C. 1001 (1970)).

(c) *Labeling.* An application, petition, or other request for action by the DOE or a State Office should be clearly labeled according to the nature of the action involved (e.g., "Application for Assignment") both on the document and on the outside of the envelope in which the document is transmitted.

(d) *Obligation to supply information.* A person who files an application, petition, complaint, appeal or other request for action is under a continuing obligation during the proceeding to provide the DOE or a State Office with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, complaint, appeal or request for action that is subsequently filed by that person with any DOE office or State Office.

(e) *The same or related matters.* A person who files an application, petition, complaint, appeal or other request for action by the DOE or a State Office shall state whether, to the best knowledge of that person, the same or related issue, act or transaction has been or presently is being considered or investigated by any DOE office, other Federal agency, department or instrumentality; or by a State Office, a state or municipal agency or court; or by any law enforcement agency; including, but not limited to, a consideration or investigation in connection with any proceeding described in this part. In addition, the person shall state whether contact has been made by the person or one acting on his behalf with any person who is employed by the DOE or any State Office with regard to the same issue, act or transaction or a related issue, act or transaction arising out of the same factual situation; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or dates of the contact.

(f) *Request for confidential treatment.* (1) If any person filing a document with the DOE or a State Office claims that some or all the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552 (1970)), is information referred to in 18 U.S.C. 1905 (1970), or is otherwise exempt by law from public disclosure, and if such person requests the DOE or a State Office not to disclose such information, such person shall file together with the document a second

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copy of the document from which has been deleted the information for which such person wishes to claim confidential treatment. The person shall indicate in the original document that it is confidential or contains confidential information and may file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If the person filing a document does not submit a second copy of the document with the confidential information deleted, the DOE or a State Office may assume that there is no objection to public disclosure of the document in its entirety.

(2) The DOE or a State Office retains the right to make its own determination with regard to any claim of confidentiality. Notice of the decision by the DOE or a State Office to deny such claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

(g) *Separate applications, petitions or requests.* Each application, petition or request for DOE action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act or transaction, or are submitted in connection with the same proceeding.

§ 205.10 Effective date of orders.

Any order issued by the DOE or a State Office under this chapter is effective as against all persons having actual notice thereof upon issuance, in accordance with its terms, unless and until it is stayed, modified, suspended, or rescinded. An order is deemed to be issued on the date, as specified in the order, on which it is signed by an authorized representative of the DOE or a State Office, unless the order provides otherwise.

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§ 205.11 Order of precedence.

(a) If there is any conflict or inconsistency between the provisions of this part and any other provision of this chapter, the provisions of this part shall control with respect to procedure.

(b) Notwithstanding paragraph (a) of this section, Subpart I of Part 212 of this chapter shall control with respect to prenotification and reporting and Subpart J of Part 212 of this chapter shall control with respect to accounting and financial reporting requirements.

§ 205.12 Addresses for filing documents with the DOE.

(a) All applications, requests, petitions, appeals, reports, DOE or FEO forms, written communications and other documents to be submitted to or filed with the DOE National Office in accordance with this chapter shall be addressed as provided in this section. The DOE National Office has facilities for the receipt of transmissions via TWX and FAX. The FAX is a 3M full duplex 4 or 6 minute (automatic) machine.

FAX Numbers	TWX Numbers
(202) 254-6175.....	(701) 822-9454
(202) 254-6461.....	(701) 822-9459

(1) Documents for which a specific address and/or code number is not provided in accordance with paragraphs (a)(2) through (7) of this section, shall be addressed as follows: Department of Energy, Attn: (name of person to receive document, if known, or subject), Washington, D.C. 20461.

(2) Documents to be filed with the Office of Exceptions and Appeals, as provided in this part or otherwise, shall be addressed as follows. Office of Exceptions and Appeals, Department of Energy, Attn: (name of person to receive document, if known, and/or labeling as specified in § 205.9(c)), Washington, D.C. 20461.

(3) Documents to be filed with the Office of General Counsel, as provided in this part or otherwise, shall be addressed as follows: Office of the General Counsel, U.S. Department of

Energy, Attn: (name of person to receive document, if known, and labeling as specified in § 205.9(c)), 1000 Independence Avenue, Washington, D.C. 20585.

(4) Documents to be filed with the Office of Private Grievances and Redress, as provided in this part or otherwise, shall be addressed as follows: Office of Private Grievances and Redress, Department of Energy, Attn: (name of person to receive document, if known and/or labeling as specified in § 205.9(c)), Washington, D.C. 20461.

(5) All other documents filed, except those concerning price (see paragraph (a)(6) of this section), those designated as DOE or FEO forms (see paragraph (a)(7) of this section), and "Surplus Product Reports" (see paragraph (a)(8) of this section), but including those pertaining to compliance and allocation (adjustment and assignment) of allocated products, are to be identified by one of the code numbers stated below and addressed as follows: Department of Energy, Code—, labeling as specified in § 205.9(c), Washington, D.C. 20461.

CODE NUMBERS

	Code
Product:	
Crude oil.....	10
Naphtha and gas oil.....	15
Propane, butane and natural gasoline.....	25
Other products.....	30
Bunker fuel.....	40
Residual fuel (nonutility).....	50
Motor gasoline.....	60
Middle distillates.....	70
Aviation fuels.....	80
Submissions by specific entities:	
Electric utilities.....	45
Department of Defense.....	55

(6) Documents pertaining to the price of covered products, except those to be submitted to other offices as provided in this part, shall be addressed to the Department of Energy, Code 1000, Attn: (name of person to receive document, if known, and/or labeling as specified in § 205.9(c)), Washington, D.C. 20461.

(7) Documents designated as DOE or FEO forms shall be submitted in accordance with the instructions stated in the form.

(8) "Surplus Product Reports" shall be submitted to the Department of Energy, Post Office Box 19407, Washington, D.C. 20036.

(9) Documents to be filed with the Director of Oil Imports, as provided in this part or otherwise, shall be addressed as follows: Director of Oil Imports, Department of Energy, P.O. Box 7414, Washington, D.C. 20044.

(10) Petitions for rulemaking to be filed with the Economic Regulatory Administration National Office shall be addressed as follows: Economic Regulatory Administration, Attn: Assistant Administrator for Regulations and Emergency Planning (labeled as "Petition for Rulemaking,"), 2000 M Street, N.W., Washington, D.C. 20461.

(b) All reports, applications, requests, notices, complaints, written communications and other documents to be submitted to or filed with an DOE Regional Office in accordance with this chapter shall be directed to one of the following addresses, as appropriate:

REGION 1

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont; Regional Office, Department of Energy, 150 Causeway Street, Boston, Massachusetts 02114.

REGION 2

New Jersey, New York, Puerto Rico, Virgin Islands; Regional Office, Department of Energy, 26 Federal Plaza, New York, New York 10007.

REGION 3

Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia; Regional Office, Department of Energy, Federal Office Building, 1421 Cherry Street, Philadelphia, Pennsylvania 19102.

REGION 4

Alabama, Canal Zone, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina; Regional Office, Department of Energy, 1655 Peachtree Street NW., Atlanta, Georgia 30309.

REGION 5

Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin; Regional Office, Department of Energy, 175 West Jackson Street, Chicago, Illinois 60604.

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REGION 6

Arkansas, Louisiana, New Mexico, Oklahoma, Texas; Regional Office, Department of Energy, 212 North Saint Paul Street, Dallas, Texas 75201.

REGION 7

Iowa, Kansas, Missouri, Nebraska; Regional Office, Department of Energy, Federal Office Building, P.O. Box 15000, 112 East 12th Street, Kansas City, Missouri 64106.

REGION 8

Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming; Regional Office, Department of Energy, Post Office Box 26247, Belmar Branch, Denver, Colorado 80226.

REGION 9

American Samoa, Arizona, California, Guam, Hawaii, Nevada, Trust Territory of the Pacific Islands; Regional Office, Department of Energy, 111 Pine Street, San Francisco, California 94111.

REGION 10

Alaska, Idaho, Oregon, Washington; Regional Office, Department of Energy, Federal Office Building, 909 First Avenue, Room 3098, Seattle, Washington 98104.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36555, Aug. 21, 1975; 45 FR 37684, June 4, 1980]

§ 205.13 Where to file.

(a) Except as otherwise specifically provided in other subparts of this part, all documents to be filed with the ERA pursuant to this part shall be filed with the appropriate ERA Regional Office (unless otherwise specified in Part 211 of this Chapter), except that all documents shall be filed with the ERA National Office that relate to:

(1) The allocation and pricing of crude oil pursuant to Subpart C of Part 211 and Part 212 of this chapter;

(2) Refinery yield controls pursuant to Subpart C of Part 211 of this chapter;

(3) The pricing of propane, butane and natural gasoline pursuant to Part 212 of this chapter and the allocation of butane and natural gasoline pursuant to Part 211 of this chapter;

(4) The allocation and pricing of middle distillate fuels pursuant to Subpart G of Part 211 and Part 212 of this chapter, filed by electric utilities;

(5) The allocation and pricing of aviation fuel pursuant to Subpart H of Part 211 and Part 212 of this chapter, filed by civil air carriers (except air taxi/commercial operators);

(6) The allocation and pricing of residual fuel oil pursuant to Subpart I of Part 211 and Part 212 of this chapter, filed by electric utilities;

(7) The allocation and pricing of naphtha and gas oil pursuant to Subpart J of Part 211 and Part 212 of this chapter;

(8) The allocation and pricing of other products pursuant to Subpart K of Part 211 and Part 212 of this chapter;

(9) An application for an exemption under Subpart E of this part; requests for a rulemaking proceeding under Subpart L of this part or for the issuance of a ruling under Subpart K of this part; and petitions to the Office of Private Grievances and Redress under Subpart R of this part;

(10) The pricing of products pursuant to Part 212 of this chapter, filed by a refiner; and

(11) The allocation of crude oil and other allocated products to meet Department of Defense needs pursuant to Part 211 of this chapter.

(12) The allocation of crude oil and other allocated products to be utilized as feedstock in a synthetic natural gas plant, pursuant to § 211.29.

(13) Allocations, fee-paid and fee-exempt licenses issued pursuant to Part 213 of this chapter.

(b) Applications by end-users and wholesale purchasers for an allocation under the state set-aside system in accordance with § 211.17 shall be filed with the appropriate State Office.

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(c) Applications to a State Office or a DOE Regional Office shall be directed to the office located in the state or region in which the allocated product will be physically delivered. An applicant doing business in more than one state or region must apply separately to each State or region in which a product will be physically delivered, unless the State Offices or Regional Offices involved agree otherwise.

[39 FR 35489, Oct. 1, 1974, as amended at 39 FR 36571, Oct. 11, 1974; 39 FR 39022, Nov. 5, 1974; 40 FR 28446, July 7, 1975; 40 FR 36555, Aug. 21, 1975; 44 FR 60648, Oct. 19, 1979]

§ 205.14 Ratification of prior directives, orders, and actions.

All interpretations, orders, notices of probable violation or other directives issued, all proceedings initiated, and all other actions taken in accordance with Part 205 as it existed prior to the effective date of this amendment, are hereby confirmed and ratified, and shall remain in full force and effect as if issued under this amended Part 205, unless or until they are altered, amended, modified or rescinded in accordance with the provisions of this part.

§ 205.15 Public docket room.

There shall be established at the DOE National Office, 12th and Pennsylvania Avenue, NW., Washington, D.C., a public docket room in which shall be made available for public inspection and copying:

(a) A list of all persons who have applied for an exception, an exemption, or an appeal, and a digest of each application;

(b) Each decision and statement setting forth the relevant facts and legal basis of an order, with confidential information deleted, issued in response to an application for an exception or exemption or at the conclusion of an appeal;

(c) The comments received during each rulemaking proceeding, with a verbatim transcript of the public hearing if such a public hearing was held; and

(d) Any other information required by statute to be made available for public inspection and copying, and any

information that the DOE determines should be made available to the public.

Subparts B-C—[Reserved]

Subpart D—Exception

AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, Pub. L. 95-91; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91, as amended, Pub. L. 95-620; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: Sections 205.56 through 205.69E issued at 44 FR 16887, Mar. 20, 1979, unless otherwise noted.

§ 205.50 Purpose and scope.

(a)(1) This subpart establishes the procedures for applying for an exception from a regulation, ruling or generally applicable requirement based on an assertion of serious hardship or gross inequity and for the consideration of such application by the DOE, except that applications for an exception from a regulation, ruling, or generally applicable requirement under Part 213 shall be based on the provisions of paragraph (a)(2) of this section.

(2)(i) The DOE, in considering an application for an exception by a person affected by Part 213, may, without regard to the limits of the maximum levels of imports established in section 2 of Proclamation No. 3279:

(A) Modify on grounds of exceptional hardship, any import allocation made to any person under Part 213 of this chapter;

(B) Grant allocations of imports of crude oil and unfinished oils in special circumstances to persons with importing histories who do not qualify for allocations under Part 213 of this chapter;

(C) Grant allocations of imports of finished products on grounds of exceptional hardship;

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(D) Grant allocations of imports of crude oil, unfinished oils and finished products to independent refiners or established independent marketers who are experiencing exceptional hardship, or in emergencies in order to assure, insofar as practicable, that adequate supplies are available; and

(E) Grant refunds, in whole or in part, of license fees paid by persons to whom licenses were issued for imports which they subsequently became entitled to make on a fee-exempt basis.

(ii) In its consideration of any application filed pursuant to this paragraph (a)(2), which is based on a claim of exceptional hardship in accordance with paragraphs (a)(2)(i)(A), (C), and (D) of this section, the DOE shall, subject to the provisions of § 213.26, follow the guidelines set forth in Appendix II of this subpart.

(iii) Licenses issued pursuant to allocations made under this subparagraph shall be exempt from license fees prescribed in paragraph (c) of § 213.35 of this chapter.

(b) A request for an interpretation or other specific action which includes, or could be construed to include, an application for an exception may be treated solely as a request for an interpretation or other action, and processed as such by DOE.

(c) The filing of an application for an exception shall not constitute grounds for non-compliance with the requirements of the regulation, ruling or generally applicable requirement from which an exception is sought, unless a stay has been issued in accordance with Subpart I of this part.

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36555, Aug. 21, 1975; 41 FR 2227, Jan. 15, 1976; 41 FR 22343, June 3, 1976]

§ 205.51 What to file.

(a) A person filing under this subpart shall file an "Application for Exception," which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

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(b) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted prior to the issuance of a Proposed Decision and Order, the procedures set out in § 205.9(f) shall apply. Section 205.61 governs claims for the confidential treatment of information after the issuance of a Proposed Decision and Order. All documents shall be filed in duplicate, unless they contain confidential information, in which case they must be filed in triplicate, with all confidential information deleted from two of the copies.

[39 FR 35489, Oct. 1, 1974, as amended at 44 FR 16890, Mar. 20, 1979]

§ 205.52 Where to file.

(a) Except as provided in paragraph (b) of this section, all applications for exception shall be filed with the Office of Exceptions and Appeals at the address provided in § 205.12.

(b)(1) All applications for exception to Part 211 that relate to adjustments to base period use of motor gasoline, middle distillates (except for use by electric utilities and as bunker fuel), residual fuel oil (except for use by electric utilities and as bunker fuel), or propane, shall be filed with the appropriate regional office at the address provided in § 205.12.

(2) All applications for exception to Part 212 that relate to the retail sale of motor gasoline, heating oil, diesel fuel, or propane shall be filed with the appropriate regional office at the address provided in § 205.12.

(3) All applications for exemption to § 213.15 by persons seeking to import residual fuel oil into District I in order to satisfy contractual obligations or other projected needs for the allocation period May 1, 1977, through April 30, 1978, shall be filed with the Director of Oil Imports in accordance with Special Guideline I in Appendix II of this subpart.

[39 FR 35489, Oct. 1, 1974, as amended at 39 FR 36854, Oct. 15, 1974; 42 FR 54256, Oct. 5, 1977]

§ 205.53 Notice.

(a) The applicant shall send by United States mail a copy of the appli-

cation and any subsequent amendments or other documents relating to the application, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to each person who is reasonably ascertainable by the applicant as a person who will be aggrieved by the DOE action sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the DOE office with which the application was filed within 10 days. The application filed with the DOE shall include certification to the DOE that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent.

The DOE may require the applicant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the *FEDERAL REGISTER*.

(c) The DOE shall serve notice on any other person readily identifiable by the DOE as one who will be aggrieved by the DOE action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of such notice.

(d) Any person submitting written comments to the DOE with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to the applicant. The person shall certify to the DOE that

he has complied with the requirements of this paragraph. The DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

(e) At regular intervals, the DOE shall publish a list of all persons who have applied for an exception under this subpart, with a brief description of the factual situation and the relief requested.

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(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application. When the application pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction shall be submitted.

(b) The applicant shall state whether he requests or intends to request that there be a conference or hearing regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference or hearing is held when it will be most beneficial. The request and the DOE's determination regarding it shall be made in accordance with Subpart M of this part.

(c) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rulings, regulations, interpretations and decisions on appeals and exceptions relied upon to support the particular action sought therein.

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(d) The application shall specify the exact nature and extent of the relief requested.

(e) Applications for exceptions to be considered pursuant to § 205.50(a)(2) shall include with the information furnished pursuant to this section, the information specified in the appendix to this subpart.

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36555, Aug. 21, 1975]

§ 205.55 DOE evaluation.

(a) *Processing.* (1) The DOE may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. With respect to applications to be considered pursuant to § 205.50(a)(2), the Office of Exceptions and Appeals shall forward to the Director of Oil Imports copies of all submissions to it, and shall provide the Director opportunity to comment on the application. The DOE may solicit and accept submissions from third persons relevant to any application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the DOE may consider any other source of information. The DOE on its own initiative may convene a hearing or conference, if, in its discretion, it considers that such hearing or conference will advance its evaluation of the application.

(b) *Criteria.* (1) The DOE shall only consider an application for an exception when it determines that a more appropriate proceeding is not provided by this part.

(2) An application for an exception may be granted to alleviate or prevent serious hardship or gross inequity, except that an application for an exception by a person affected by Part 213 shall, in accordance with Proclamation No. 3279, as amended, be evaluated in light of the criteria specified in § 205.50(a)(2).

(3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

(4) With regard to an exception from the provisions of Part 215 of this

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chapter, the criteria shall be those provided in such part.

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36555, Aug. 21, 1975]

§ 205.56 Issuance of proposed decision and order.

(a) After considering the submissions of the parties and other relevant information in the record of the proceeding, the Office of Hearings and Appeals ordinarily shall issue a Proposed Decision and Order with respect to the Application for Exception. The decision shall include a written statement of reasons setting forth the facts and law supporting the proposed order.

(b) The DOE shall serve a copy of the Proposed Decision and Order upon the applicant and, after modification to ensure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, on every person who submitted written comments in the prior proceeding or is known to have a direct and distinctive interest in the proceeding. A copy of the Proposed Decision and Order shall also be placed in the Public Docket Room of the Office of Hearings and Appeals.

§ 205.57 Publication of proposed decision and order.

Except as provided in § 205.69C, the Office of Hearings and Appeals shall publish notice of issuance of a Proposed Decision and Order in the FEDERAL REGISTER. The notice shall specify the person to whom the Proposed Decision and Order was issued and the person's location. The notice shall also describe in general terms whether or not relief has been granted, the nature and time period of any proposed relief, and the products and geographical area involved. The notice shall state that any person wishing to participate in further proceedings involving the matter must file either a Notice of Objection or a Notice of Intent to Participate within ten days after service. Persons who have not been served with the Proposed Decision and Order shall be deemed to have been served three days after the required publication in the FEDERAL REGISTER.

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§ 205.58 Notice of objection.

(a) Any person who would be aggrieved by the issuance of the Proposed Decision and Order in final form may file a Notice of Objection. A Notice of Objection shall be filed in duplicate within 10 days after service of the Proposed Decision and Order and shall contain: (1) A brief statement describing the manner in which the person filing the Notice would be adversely affected should the proposed order become final, (2) a statement that the person intends to file a Statement of Objections in accordance with § 205.62, (3) a certification of the names and addresses of all persons served with the notice, and (4) a certification that the requirements of paragraph (c) of this section have been met. This Notice is intended to be brief and should not contain any confidential information. The DOE shall place a copy of the Notice in the Public Docket Room of the Office of Hearings and Appeals.

(b) An aggrieved party who fails to file a timely Notice of Objection shall be deemed to consent to the issuance of the proposed order as a final order and shall also be deemed to waive all appeal rights.

(c) A person filing a Notice of Objection shall serve a copy of the Notice on every other person who participated in prior proceedings through the submission of written comments.

(d) If no person files a timely Notice of Objection or if no person files a timely Statement of Objections, the Office of Hearings and Appeals may issue the Proposed Decision and Order in final form without conducting any further proceedings in the matter.

§ 205.59 Notice of intent to participate.

(a) Any person who would not be aggrieved by the issuance of the Proposed Decision and Order in final form but who nevertheless wishes to participate in any further proceedings in the matter must file a Notice of Intent to Participate within 10 days after service of the Proposed Decision and Order.

(b) A Notice of Intent to Participate should briefly state the person's interest in the exception proceeding and the particular aspects of the proceed-

ing (e.g., oral argument, submission of briefs, or discovery) in which the person wishes to participate actively.

(c) The Office of Hearings and Appeals may request any person filing a Notice of Intent to Participate to file additional information describing in detail the person's interest in the proceeding and specifying the reasons why the person's participation in one or more stages of the proceeding would substantially contribute to the resolution of the issues involved. The request shall specify the time period within which a reply must be filed.

(d) After considering a Notice submitted pursuant to paragraph (b) of this section the Office of Hearings and Appeals may determine that a person is not a proper party or participant in the proceeding or that its participation shall be limited.

(e) Persons with similar interests may be ordered to file a plan indicating how their participation can be coordinated in the interest of fair and efficient proceedings. Such plans ordinarily must be filed within ten days of receipt of an order that they be filed. If a requested plan is inadequate or untimely, the Office of Hearings and Appeals may provide for lead counsel or for a common representative in appropriate cases. In making determinations under this section, the Office of Hearings and Appeals shall consider the interest of persons in having representatives of their own choosing, the need for an expeditious resolution of the issues, the complexity of the issues, the number of persons involved and the degree of similarity of the interests of the persons seeking to participate.

(f) The purpose of a Notice of Intent to Participate is to express the desire of the person filing the document to play an active role in one or more aspects of a proceeding to resolve arguments presented in Statements of Objections. Consequently, if no Statements of Objections are filed in a proceeding, it is likely that the Proposed Decision and Order will be issued in final form without further proceedings. Under those circumstances pending Notices of Intent to Participate will become moot.

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§ 205.60 Official service list.

Following its receipt of Notices of Objection and its consideration of Notices of Intent to Participate, the Office of Hearings and Appeals shall establish an Official Service List for the proceeding. The Official Service List shall specify the persons who must be served during all or certain aspects of the proceeding and may make special provisions for methods of service that the Office of Hearings and Appeals considers in its discretion to be appropriate. The List may be revised at any time during the proceeding.

§ 205.61 Filing and service requirements.

(a)(1) Statements of Objections to a Proposed Decision and Order, Responses to such Statements, and any motions or other documents filed in connection with a Proposed Decision and Order shall meet the requirements of § 205.9 and shall be filed with the Office of Hearings and Appeals in accordance with § 205.4. Documents properly mailed pursuant to § 205.4(b) will be considered to be filed upon mailing. Unless otherwise specified, any participant may file a response to a motion within ten days of service.

(2) All documents shall be filed in duplicate, unless they contain confidential information, in which case they must be filed in triplicate.

(3) If a claim is made that a portion of a document contains confidential information, that information must be deleted from two of the three copies of that document which are filed. One copy from which confidential information has been deleted will be placed in the Office of Hearings and Appeals Public Docket Room.

(b) With respect to any filing under this section, the person filing the document shall serve each person on the Official Service List and shall notify the person of the period of time in which a response or comment may be filed. Service shall be made in accordance with § 205.7 and may also be made by deposit in the regular United States mail, properly stamped and addressed, when accompanied by proof of service consisting of a certificate of counsel or an affidavit of the person making the service. If any filing con-

tains information considered to be confidential, a person may serve copies with the allegedly confidential information deleted upon all persons on the Official Service List.

(c) Any filing made under this section shall include a certificate of service, which includes the date and manner of service for each person on the Official Service List.

§ 205.62 Statement of objections.

(a) A person who has filed a Notice of Objections shall file a Statement of Objections to the issuance in final form of the Proposed Decision and Order. A Statement of Objections must be filed within 30 days after service of the Proposed Decision and Order.

(b) The Statement of Objections shall specify particular findings of fact or conclusions of law that are contested, set forth alternative findings, and state how the Proposed Decision and Order should be modified to meet these contentions.

(c) The Statement shall include a discussion of all relevant authorities which support the position asserted, including statutes, regulations, rulings, interpretations, previous decisions of DOE or its predecessor agencies and court decisions. All available documents that are not already included in the record of the proceeding and that are intended to be introduced in support of the Statement shall be attached and shall be discussed in the Statement.

(d) The Statement may identify issues for immediate final determination on the ground that the issues can be resolved by application of the law to facts which are not contested.

(e) The Statement may suggest deadlines which may be adopted by the Office of Hearings and Appeals for the purpose of expediting the proceeding.

(f) A person must file a Statement of Objections on a timely basis in order to exhaust administrative remedies.

§ 205.63 Response.

(a) Any person on the Official Service List may file a Response to a Statement of Objections within 15 days

after service of the Statement of Objections to which it is addressed. A Response shall clearly specify which particular factual or legal contentions set forth in the Statement are disputed.

(b) The Response shall conform to all the requirements applicable to Statements of Objections under § 205.62(c) and may discuss the subjects referred to in § 205.62 (d) or (e).

§ 205.64 Motion for evidentiary proceeding.

(a) If material factual issues remain in dispute after all Statements of Objections and Responses have been filed, the Director of the Office of Hearings and Appeal or his designee may issue an Order establishing a mechanism for resolving these issues. The preferred method of resolving disputed factual issues shall be by the submission of additional written documents, including affidavits. Next in order of preference shall be a requirement that a party or participant submit a response to written questions of a party, a participant or the Office of Hearings and Appeals (interrogatories). Next in order of preference shall be a requirement that a witness testify under oath, subject to cross-examination and for the record, but without a hearing officer present (deposition). Last in order of preference shall be the convening of an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for the record and in the presence of a Presiding Officer (evidentiary hearing.)

(b) A party or participant seeking the issuance of the Order referred to in paragraph (a) of this section shall file a Motion for Evidentiary Proceeding at the same time it files its Statement of Objections or Response.

(c) A Motion for Evidentiary Proceeding must demonstrate that the requested methods for obtaining information (i.e., submissions of additional written material, interrogatories, depositions or evidentiary hearing) are consistent with the order of preference specified in this section. For example, a motion requesting an evidentiary hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning

that is anticipated, the relevance of the questioning to the proceeding and the reasons why the information to be provided through the testimony could not be provided through another, more preferred method. A motion must identify the information requested with sufficient specificity to permit a reasoned decision concerning the relevance and materiality of the requested information and the appropriateness of the requested method for obtaining it. A motion may be summarily denied for lack of sufficient specificity, because it would place an undue burden on another person or the DOE or because it will cause undue delay.

(d) A Motion for Evidentiary Proceeding must be served on any person from whom information is sought, even if service is not otherwise required by this subpart.

§ 205.65 Response to motion for evidentiary proceeding.

Any person who wishes to respond to a Motion for Evidentiary Proceeding must do so within ten days of service. The response must specify the particular parts of the motion that are disputed and may argue that the requested information is irrelevant or immaterial, that different methods for obtaining the requested information are more appropriate, or that limitations should be imposed to mitigate an undue burden or avoid delay.

§ 205.66 Obtaining confidential information; motion for discovery and protective order.

(a) A participant who has unsuccessfully attempted in writing to obtain information that another person claims is confidential may file a Motion for Discovery and Protective Order. Such a motion shall meet the requirements of § 205.64 and shall specify the particular confidential information that the movant seeks and the reasons why the information is necessary for the movant to present its position adequately. A copy of a written request for information, a certification concerning when and to whom it was mailed and a copy of the response, if any, shall be appended to the motion. The motion shall give the possessor of

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the information notice that a Response to the motion may be filed within ten days after service of the motion. The motion shall specify the safeguards, if any, that should be imposed if the information is ordered to be released.

(b) A Response to a Motion for Discovery and Protective Order shall clearly specify particular factual and legal matters that are disputed, including contentions concerning appropriate safeguards to be imposed if the information is ordered to be released.

(c) The Presiding Officer may, in his or her discretion, order that some or all of the information be released and may make some or all of the information released subject to a Protective Order.

§ 205.67 Disposition of motions.

(a) In considering motions filed by the parties, the Director of the Office of Hearings and Appeals or his designee may order the submission of additional information and conduct conferences or hearings either in response to requests by the parties or on his own initiative. These proceedings may be held pursuant to § 205.171, § 205.172, § 205.173, § 205.68 or § 205.69, or pursuant to special rules promulgated for this purpose by the Presiding Officer.

(b) In reaching a decision with respect to a motion filed under this subpart, the Office of Hearings and Appeals shall consider all relevant information in the record. A motion may be decided by the issuance of an Order either during the course of a hearing or conference in which an official transcript is maintained or in a separate written Decision and Order.

(c) An Order of the Office of Hearings and Appeals issued under this section is an Interlocutory Order which is subject to further administrative review or appeal only upon issuance of the Decision and Order referred to in § 205.69B.

§ 205.68 Evidentiary hearing.

(a) If an Order is issued granting a Motion for an Evidentiary Hearing, in whole or in part, the Order shall specify the parties to the hearing, any limitations on the participation of a party, and the issues of fact to be considered

at the evidentiary hearing. The Order may also require parties that have adopted similar positions to consolidate their presentations pursuant to a joint plan as specified in § 205.59(e). If the Office of Hearings and Appeals determines that requiring the filing of a plan would cause undue delay, it may dispense with that requirement of § 205.59(e).

(b) All evidentiary hearings convened pursuant to this Subpart shall be conducted by the Director of the Office of Hearings and Appeals or his designee. At any evidentiary hearing the parties shall have the opportunity to present material evidence that directly relates to a particular issue of fact set forth for hearing. The Presiding Officer shall afford the parties an opportunity to cross examine all witnesses concerning disputed material facts or opinions. The Presiding Officer may administer oaths or affirmations, rule on objections to the presentation of evidence, receive relevant material, require the advance submission of documents offered as evidence, rule on any motion to conform the Proposed Decision and Order to the evidence presented, rule on motions for continuance, dispose of procedural requests, determine the format of the hearing, modify any order granting a Motion for Evidentiary Hearing, direct the written motions, documents or briefs be filed with respect to issues raised during the course of the hearing, ask questions of witnesses, issue subpoenas, and otherwise regulate the conduct of the hearing. The Presiding Officer may take reasonable measures to exclude duplicative material from the hearing and may place appropriate limitations on the number of witnesses that may be called by a party. The presiding officer may also require that evidence be submitted through affidavits or other documents if the direct testimony of witnesses will unduly delay the orderly progress of the hearing or would not substantially contribute to resolving the issues involved in the hearing. The provisions of § 205.8 which relate to subpoenas and witness fees shall apply to any evidentiary hearing, except that the review procedures set forth in

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§§ 205.8(h) (2), (3), and (4) shall not apply.

§ 205.69 Hearing for the purpose of oral argument only.

(a) A person who has filed a Statement of Objections or a Response is entitled, upon timely request, to a hearing for the presentation of oral argument with respect to the Proposed Decision and Order. A request for oral argument will be considered timely if it is filed at the same time the Statement of Objections or the Response is filed.

(b) The Office of Hearings and Appeals may, upon motion or on its own initiative, convene a hearing for the purpose of receiving oral argument with respect to a Proposed Decision and Order. The Office of Hearings and Appeals may also require that parties participating in an oral argument file appropriate briefs, outlines or documents prior to the hearing.

(c) If an evidentiary hearing is convened and a hearing for oral argument has been requested, the Office of Hearings and Appeals shall determine whether the hearing for oral argument shall be held in conjunction with the evidentiary hearing or at a separate time.

(d) A hearing for the purpose of receiving oral argument will generally be conducted only after the issues involved in the proceeding have been delineated and after all written material requested by the Office of Hearings and Appeals has been submitted. The Presiding Officer may, however, require further written submissions in support of any position advanced or issue raised at the hearing, and may allow responses to any such submissions.

(e) In conducting a hearing for the purpose of oral argument the Presiding Officer may limit or extend the length of arguments, consolidate parties, make rulings concerning the relevance of argument, question the participants, determine the format of the hearing, make other procedural rulings and otherwise regulate the conduct of the hearing.

§ 205.69A Interim decision and order.

(a) Notwithstanding any other provisions of this subpart, the Director of the Office of Hearings and Appeals or his designee may, upon motion or on his own initiative, issue an Interim Order for the purpose of granting exception relief during the pendency of an exception proceeding. Such an order may be issued only after a Proposed Decision and Order has been issued and only if the Office of Hearings and Appeals determines that public interest considerations strongly favor the approval of an interim exception pending the completion of the procedures ordinarily required by this subpart. In making that determination the Office of Hearings and Appeals shall consider the following factors:

(1) The probability that exception relief will ultimately be granted;

(2) The harm an applicant is likely to incur unless exception relief is approved immediately; and

(3) The harm other persons are likely to incur if the Interim Order is issued.

(b) An Interim Decision and Order issued pursuant to this Section shall be served promptly on all persons on the Official Service List. The Decision shall specify the facts and law on which it is based, including a discussion of the factors listed in paragraph (a) of this section.

(c) Any person aggrieved by an Interim Decision and Order may file an Application for a Stay under Subpart I with the Office of Hearings and Appeals.

(d) An Interim Order issued under this section is interlocutory in nature and is therefore subject to appeal only upon issuance of the Decision and Order referred to in § 205.69B.

§ 205.69B Final decision and order; appeal.

(a) After considering the entire record, the Director of the Office of Hearings and Appeals or his designee shall issue a final Decision and Order. The Decision shall state the factual and legal basis for the Order. In cases considered to be clearly controlled by prior Decisions of the Office of Hearings and Appeals, or a court, the Deci-

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sion may be limited to a summary statement of the reasons for the Decision and a citation to precedent.

(b) The Order shall provide that any person whose interest is adversely affected by a denial of exception relief may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations, within 30 days after the issuance of the Decision and Order.

(c) In order to exhaust administrative remedies in the case of a denial of exception relief, a person must file a timely appeal under paragraph (b) of this section and await the issuance of a final order in the appeal proceeding.

§ 205.69C Special decision and order procedure; waiver of Federal Register notice.

(a) When the circumstances warrant, the Office of Hearings and Appeals may issue a Final Decision and Order pursuant to § 205.69B without first issuing a Proposed Decision and Order pursuant to § 205.56 after considering the following factors:

(1) The thoroughness with which issues have already been argued in the proceeding;

(2) The nature of the evidence that has already been presented in the proceeding and the likelihood that additional useful evidence would be submitted subsequent to the issuance of a Proposed Decision and Order;

(3) The need for an expeditious determination of the issues presented;

(4) The financial resources with which existing parties can participate effectively in continued proceedings;

(5) Whether an exception was previously granted or denied to the applicant for the same reasons advanced in the present proceeding; and

(6) The public interest.

(b) In the alternative, the Director of the Office of Hearings and Appeals or his designee may, after considering the factors referred to in paragraph (a) of this section issue a Proposed Decision and Order but waive the notice requirements specified in § 205.57.

§ 205.69D Presiding officer; deadlines; limitations; adverse findings.

(a) The Presiding Officer referred to in this subpart shall be the Director of

the Office of Hearings and Appeals or his designee.

(b) The Presiding Officer may exercise any of the authority and issue any of the orders specified in this part.

(c) The Presiding Officer may permit any document or submission filed under this subpart, other than an appeal to FERC, to be amended or withdrawn after it has been filed or to be filed within a time period different from that specified in this subpart. The Presiding Officer may issue ancillary Orders, reconsider any determination, or make any ruling or determination deemed necessary to ensure that the proceedings specified in this subpart are conducted in an appropriate manner and are not unduly delayed.

(d) The Presiding Officer may determine that it is appropriate to make findings of fact adverse to the interests of any party or participant who violates an order, fails to make a timely filing or interferes with the orderly conduct of the proceedings.

(e) After notifying a participant or party of proposed action under paragraph (d) of this section and providing an opportunity for oral argument, the Presiding Officer may limit further participation in a proceeding by that person or his representative for disruptive or dilatory conduct or for a failure to participate actively.

(f) The Presiding Officer may issue subpoenas and special report orders with respect to any matter under his jurisdiction pursuant to this subpart.

(g) The Presiding Officer also may specify the time and place for hearings or for other methods of obtaining information specified in §§ 205.64, 205.66, 205.68, 205.69 or in other provisions of this subpart.

(h) The Presiding Officer may issue rulings or orders which are appropriate to conduct a fair, orderly or efficient proceeding, including the authority to administer oaths and affirmations, to regulate the conduct of the parties, to rule on the admissibility or form of submission of evidence, to modify orders, to direct the submission of written evidence or briefs, to place or remove limitations on the presentations of the parties, to provide for recesses or postponements, to determine that specified issues be re-

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solved based on written submissions rather than on testimony and otherwise to provide for fair, orderly or efficient hearings.

§ 205.69E Ex Parte communications: prohibition and disclosure requirement.

(a)(1) Following the issuance of a Proposed Decision and Order, no person who is a party or who is otherwise participating in a contested exception proceeding pursuant to a notice filed in accordance with § 205.59 shall engage in an *ex parte* communication with an officer or employee of the Department of Energy concerning the pending Application for Exception. This restriction does not apply to communications authorized by §§ 205.56 through 205.69D or exempted by this section.

(2) Following the issuance of a Proposed Decision and Order, any person communicating with an officer or employee of the Department of Energy concerning a pending exception proceeding other than in the manner specified in §§ 205.56 through 205.69D shall inform the DOE official that the communication relates to a pending exception matter.

(b) Communications which consist of a request for status reports, an inquiry as to procedures or a submission of confidential data pursuant to § 205.61 are not subject to the restrictions set forth in paragraph (a) of this section. In addition, the prohibition contained in paragraph (a)(1) of this section does not apply to communications with officers or employees of the DOE who are not or will not be involved either directly or indirectly in the analysis of the exception application or the decision reached with respect to the matter.

(c) If any communication occurs that violates the provisions of this section, the Office of Hearings and Appeals shall promptly make the substance of the communication available to the public and shall notify in writing all participants in the affected proceeding. The Office of Hearings and Appeals may also take any other appropriate action to mitigate the adverse impact on any person whose interest may be affected by the *ex parte* contact, including the determination

of issues adversely to the interest of the offending party or the issuance of an adverse Decision and Order.

[44 FR 16890, Mar. 20, 1979, as amended at 44 FR 22712, Apr. 17, 1979]

APPENDIX I TO SUBPART D OF PART 205—APPLICATIONS FOR EXCEPTIONS BY PERSONS AFFECTED BY PART 213

1. Contents of Application.

Applications to be considered pursuant to § 205.50(a)(2) shall include the information required pursuant to § 205.54, as well as information required under section 2 or 3 of this Appendix, as appropriate.

2. Applications for Allocations of Finished Product.

In order that applications for finished product allocations may be processed, the applicant shall furnish the items listed below.

(1) Company ownership. If applicant is not a sole proprietorship, list all companies, individuals or stockholders possessing 10 percent or more of company ownership or stock.

(2) The relief requested (expressed in barrels per day and total barrels), the particular commodity for which relief is requested, and the specific period for which relief is requested.

(3) Market area, specifying Districts, in which applicant, its subsidiaries or affiliates operate.

(4) State whether applicant, its subsidiaries or affiliates sell products to (a) motorists, (b) home owners, (c) industrial and other commercial accounts, (d) governmental agencies, (e) farmers, and (f) independent marketers for resale without brand names or under brand names different from the brand name(s) used by applicant, its subsidiaries or affiliates.

(5) State for each of the last 3 years applicant's gross sales separately by product for the particular product(s) which are the subject of the application, and, where such sales are made; specify figures for: (a) Gasoline, (b) No. 2 fuel oil, (c) residual fuel oil, (d) other products or services (Estimate where appropriate). Also state gross sales to date and estimates for the balance of the current allocation period.

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Calendar year	Quantity			
	Gallons	Barrels	Barrels per day (average)	Dollars

(6) List actual and prospective suppliers for the current allocation period of the product(s) for which an import allocation is sought. Indicate the quantities already obtained as well as offered or expected during the allocation period and the delivered price:

Supplier	Quantity			
	Gallons	Barrels	Barrels per day (average)	Delivered price per gallon

State which of the above supplies are a result of spot purchases.

(7) List past suppliers of the product(s) for which import allocations are sought in each of the last 3 years, the quantity supplied, and delivered price:

Calendar year	Supplier	Quantity supplied			Delivered price per gallon
		Gallons	Barrels	Barrels per day	

State the product volumes which the applicant acquired in each of the last 3 years through spot purchases. If past suppliers terminated any supply contracts or allocated deliveries for the current year, state the name(s) of such supplier(s), the circumstances of contract termination, and the actual amount by which deliveries were or will be reduced.

(8) State, showing docket number, all previous filings with the Oil Import Appeals Board or the DOE in the present and 3 preceding years, the amount of product requested by the applicant in each such filing, all awards received as a result of these filings, and the amounts imported, exchanged, or otherwise obtained by the authority of such awards. The reasons why any portion of an award was not utilized should be explained in detail.

(9) List all suppliers contacted for the product(s) for which import allocations are

sought for the current allocation period who did not offer any product or offered it at non-competitive prices and explain the nature of each such contact.

(10) List and describe storage facilities, transportation equipment, and any other equipment or installations relevant to the petroleum industry owned or controlled by applicant, its subsidiaries or affiliates. State whether products are supplied to applicant by tanker, barge, pipeline, railroad, or motorized equipment.

(11) Provide financial statements (Profit and Loss Statements and Balance Sheets) for the last three fiscal years and for the current fiscal year to date through the most recently completed fiscal quarter, for the applicant and any other business directly or indirectly controlled by the applicant. In the event that audited financial statements are prepared for the businesses, please submit a copy of these statements. If financial statements are not prepared for the businesses, submit a copy of income tax returns for the last three fiscal years.

(12) Provide projected current fiscal year financial statements for applicant assuming: (a) That the exception is granted as requested, and (b) that the exception request is denied. In addition, please provide a detailed description of the manner in which these projections are made and fully explain all assumptions which are included in the projections.

(13) Name the principal competitors of applicant, its subsidiaries and affiliates, in the business of marketing petroleum products. (Depending on size of applicant's operations, not more than five to ten competitors should be named.)

3. Applications for Allocations of Crude Oil and Unfinished Oils.

In order to process applications for allocations of crude oil and unfinished oils, the DOE requires the information set forth below:

(1) Company ownership. If applicant is not a sole proprietorship, list all companies, individuals or stockholders possessing 10 percent or more of company ownership or stock.

(2) The relief requested (expressed in barrels per day and total barrels), and whether the request is for offshore or Canadian crude oil, or for unfinished oils, or both, and the specific period for which relief is requested.

(3) All domestic subsidiaries and affiliates, if any, in which applicant holds an interest of 15 percent or more.

(4) Location and rated capacity of each domestic refinery owned or controlled by applicant.

(5) Average daily inputs of each refinery listed in item 5 above: (a) Of crude oil and (b) of other raw materials, in each of the

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last 3 calendar years, and in each elapsed month of the current allocation period.

(6) The volumes of (a) crude oil import allocations and (b) finished products import allocations received by the petitioner in the current year and in each of the 3 preceding years from the Office of Oil and Gas, the Oil Import Administration, or the Director, Oil Imports, as the case may be, and the amounts imported, exchanged or otherwise obtained by the authority of such awards. Unused awards should be explained in detail.

(7) State, showing docket number, all previous filings by petitioner with the Oil Import Appeals Board or the DOE in the present and 3 preceding years, the amount of product requested by the applicant in each such filing, all awards received as a result of these filings, and the amounts imported, exchanged or otherwise obtained by the authority of such awards. The reasons why any portion of an award was not utilized should be explained in detail.

(8) The approximate product yields (as percentage of total production) at each refinery listed in item 4 above during the current allocation period and the 2 preceding years.

(9) The percentages of total production of (a) gasoline, (b) No. 2 fuel oil, and (c) residual fuel oil sold to independent marketers during each quarter of the last calendar year. With respect to each of said product categories indicate what portions of such sales involved exchanges for finished product import licenses that had been issued to independent marketers.

(10) Specify the domestic and foreign sources (indicating company names) of crude oil supplies and other refinery feedstocks obtained by the applicant and the quantities received from each, in each of the last 3 years. Indicate which of these quantities involved the utilization of import licenses issued to the petitioner. In addition, state the volume of crude oil which the applicant acquired in each of the last 3 years through spot purchases.

(11) For each quarter of the last calendar year, list the weighted average cost per barrel of applicant's crude oil or other raw material supplies delivered to the refinery.

(12) List actual and/or prospective suppliers for the current allocation period of crude oil and other refinery feedstocks. Indicate the quantities already obtained as well as offered or expected during the current allocation period:

Supplier	Quantity		Delivered price per barrel
	Barrels	Barrels per calendar day	

State which of the above supplies are a result of spot purchases. To the extent that purchases already have been consummated or contract prices have been fixed, indicate the average effective cost per barrel of such crude oil supplies delivered to the refinery. Indicate also which of the supplies listed in response to this question involve the utilization of import licenses issued to applicant.

(13) List all suppliers contacted for the product(s) for which import allocations are sought for the current allocation period who did not offer any product or offered it at noncompetitive prices and explain the nature of each such contact.

Supplier	Quantity		Offered delivered price per barrel
	Barrels	Barrels per calendar day	

Provide the Board with any responses from suppliers which are or may be in violation of any government sponsored allocation program.

(14) A brief description of ownership participation of applicant in crude pipelines (including gathering systems), in finished product pipelines, and in inland water transportation equipment.

(15) Type and capacity of crude oil storage facilities at each refinery listed in item 4 above at the time of submitting the application and a brief description of mode of crude oil delivery to such facilities (pipeline, tanker, barge, railroad, etc.).

(16) Crude oil inventory at each refinery listed in item 4 above at the time of filing of the petition.

(17) Provide financial statements (Profit and Loss Statements and Balance Sheets) for the last three fiscal years and for the current fiscal year to date through the most recently completed fiscal quarter, for the applicant and any other business directly or indirectly controlled by the applicant. In the event that audited financial statements are prepared for the businesses, please submit a copy of these statements. If financial statements are not prepared for the businesses, submit a copy of income tax returns for the last three fiscal years.

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(18) Provide projected current fiscal year financial statements for the applicant assuming: (a) That the exception is granted as requested, and (b) that the exception request is denied. In addition, please provide a detailed description of the manner in which these projections are made and fully explain all assumptions which are included in the projections.

[40 FR 36556, Aug. 21, 1975. Redesignated at 41 FR 22343, June 3, 1976]

APPENDIX II TO SUBPART D OF PART 205—DISPOSITION OF REQUESTS FOR EXCEPTIONS FROM PART 213

In its consideration of any application filed pursuant to § 205.50(a)(2) which is based on a claim of hardship in accordance with paragraphs (a)(2)(i)(A), (C), and (D) of that section, the DOE shall consider the principles set forth in the Decisions and Orders issued with respect to applications for exception from other generally applicable DOE regulations to the extent that such precedents are relevant and consistent with Proclamation No. 3279, as amended, and shall give particular weight to the following factors:

1. Whether payment of the fee (or other action required under Part 213) would lead to a result unintended by Proclamation No. 3279, as amended, or would impede important national energy policy objectives, including the furtherance of competition at any level of distribution in the petroleum industry and the encouragement of market entry.

2. Whether payment of the fee (or other action required under Part 213) would so affect the operations of the firm applying for exception relief as to cause a significant reduction in service or threaten interruptions in service to present customers.

3. Whether payment of the fee would adversely affect the firm applying for exception relief in a manner which threatens its financial viability in terms of its profitability, liquidity, or the stability of its operations, would place the firm at a significant competitive disadvantage in a market in which the firm operates, or would otherwise significantly reduce competition.

4. Whether the firm applying for exception relief is likely to incur a significant deterioration in its current operating posture in contrast with historic levels as a result of its inability due to competitive conditions to increase its prices to reflect import license fees.

5. Whether the firm makes a convincing showing that adequate domestic supplies of suitable product at competitive prices are not available.

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For the allocation period May 1, 1977 through April 30, 1978, any person desiring to import residual fuel oil into District I shall be deemed to be experiencing an exceptional hardship to the extent that his available fee-exempt licenses, if any, are less than his contractual obligations or other projected needs for that period. Any person so deemed may receive additional fee-exempt licenses in the amount required to meet such obligations or needs by certifying his additional requirements to the Director of Oil Imports. The Director shall issue a license for the amount certified, except where he determines that issuance thereof would not be in accordance with the objectives of Proclamation No. 3279, as amended.

Any license issued pursuant to this Special Guideline shall be subject to the limitations contained in § 213.15(e). Licenses which remain unused at the end of the allocation period shall expire at that time.

[41 FR 22343, June 3, 1976, as amended at 42 FR 54256, Oct. 5, 1977. Redesignated and amended at 44 FR 37938, June 29, 1979]

Subpart E—Exemption

§ 205.70 Purpose and scope.

This subpart establishes the procedures for filing an application for exemption and the consideration of such by DOE. The applicant must be seeking an exemption from no less than an entire part, or subpart thereof, of this chapter. This subpart does not include the procedures for exemption of a product as provided in section 4(g) of the EPAA, and does not provide for exemptions from Part 213.

[40 FR 36557, Aug. 21, 1975]

§ 205.71 Procedures.

(a) An exemption may be effected only by amendment to the regulations. Although an application for an exemption is a request for a rulemaking, the application is not subject to the procedures of Subpart L. If a rulemaking proceeding is convened, however, it shall be held in accordance with Subpart L.

(b) An application for an exemption shall be submitted separate and apart from any other application, appeal, petition or other request submitted in accordance with this part. If an application for exemption is included with any other application, appeal, petition,

or other request, the application for exemption will not be processed, nor will it be severed for separate consideration.

§ 205.72 What to file.

A person filing under this subpart shall file an "Application for Exemption," which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

§ 205.73 Where to file.

An application for exemption shall be filed with the Office of Private Grievances and Redress at the address provided in § 205.12.

§ 205.74 Contents.

The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the DOE action sought. The application shall identify the part or parts, or subparts thereof, of this chapter from which the exemption is sought; describe the business or other reason that would justify such exemption; identify the persons or classes of persons and acts or transactions that would be affected by such exemption and describe any adverse impact; describe the benefit to the person making the application, or others, that would result if the exemption were effected; and explain the reasons why the action sought by the application cannot be accomplished by any other proceeding provided in this part. Upon request, the applicant shall submit copies of relevant contracts, agreements, leases, instruments, and other documents that are representative of those that would be affected by the granting of the requested exemption.

§ 205.75 DOE evaluation.

(a) *Processing.* All applications for exemption shall be evaluated by DOE to determine if the institution of rule-

making is warranted and if the DOE action sought by the application could more appropriately be considered in any other proceeding provided by this part.

(b) *Criteria.* (1) Rulemaking proceedings for the purposes of considering an application for exemption will be instituted only if the DOE in its discretion determines that such a proceeding would be appropriate. Among the factors that the DOE will evaluate in making a determination with respect to a rulemaking are—

(i) The impact that granting the exemption would have on the regulatory scheme and objectives;

(ii) The number of persons who would be exempted; and

(iii) The economic justification for such exemption.

(2) The DOE may summarily deny an application for exemption if—

(i) The exemption sought is not from a part or parts, or a subpart thereof, of this chapter;

(ii) The granting of an exemption to the person making the application would not have sufficient national impact, economic or otherwise, to warrant rulemaking proceedings for the purpose of considering an amendment to the regulation;

(iii) It is determined that the statutory criteria cannot be met; or

(iv) It is determined that another proceeding provided by this part is more appropriate.

§ 205.76 Decision and order.

(a) Upon consideration of the application and other relevant information obtained during the proceeding, the DOE shall issue an appropriate order. If the application is not denied, the order shall provide for publication of a notice of proposed rulemaking regarding the application in the **FEDERAL REGISTER**.

(b) The order shall include a written statement setting forth the relevant facts and legal basis for the decision. The order denying the application shall state that any person aggrieved thereby may file an appeal with Office of Exceptions and Appeals in accordance with Subpart H of this part.

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(c) In addition to the procedures provided in § 202.2 of this chapter, upon the written request of any person, which request is filed after any grant or denial of a request for an exemption under Part 209, DOE shall furnish such person, within thirty (30) days after the date on which such request is filed, with a copy of the decision and order. All such requests shall be directed to the Director of Public Affairs, Federal Energy Office, Washington, D.C. 20461, and shall be clearly marked on the envelope: "Attention: Information Access Officer." The fees for providing such decision and order shall be determined in accordance with § 202.8 of this chapter.

[39 FR 35489, Oct. 1, 1974, as amended at 41 FR 36647, Aug. 31, 1976]

§ 205.77 Timeliness.

(a) If the DOE fails to take action on any application filed under this subpart within 90 days of filing, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in this subpart.

§ 205.78 Appeal.

Any person aggrieved by an order issued by the DOE under this subpart that denies an application for exemption may file an appeal with the Office of Exceptions and Appeals in accordance with Subpart H of this part. The appeal must be filed within 30 days of service of the order from which the appeal is taken. There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

Subpart F—Interpretation

§ 205.80 Purpose and scope.

(a) This subpart establishes the procedures for the filing of a formal request for an interpretation and for the consideration of such request. Responses, which may include verbal or written responses to general inquiries or to other than formal written requests for interpretation filed with the

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General Counsel or his delegate or a Regional Counsel, are not interpretations and merely provide general information.

(b) A request for interpretation that includes, or could be construed to include an application for an exception or an exemption may be treated solely as a request for interpretation and processed as such.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.81 What to file.

(a) A person filing under this subpart shall file a "Request for Interpretation," which should be clearly labeled as such both on the request and on the outside of the envelope in which the request is transmitted, and shall be in writing and signed by the person filing the request. The person filing the request shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the person filing the request wishes to claim confidential treatment for any information contained in the request or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

§ 205.82 Where to file.

A request for interpretation shall be filed with the General Counsel or his delegate or with the appropriate Regional Counsel at the address provided in § 205.12.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267)

[39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978; 43 FR 17803, Apr. 26, 1978]

§ 205.83 Contents.

(a) The request shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the request and to the DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable) and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the request. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the request. When the request pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction must be submitted.

(b) The request for interpretation shall include a discussion of all relevant authorities, including, but not limited to, DOE rulings, regulations, interpretations and decisions on appeals and exceptions relied upon to support the particular interpretation sought therein.

§ 205.84 DOE evaluation.

(a) *Processing.* (1) The DOE may initiate an investigation of any statement in a request and utilize in its evaluation any relevant facts obtained by such investigation. The DOE may accept submissions from third persons relevant to any request for interpretation provided that the person making the request is afforded an opportunity to respond to all third person submissions. In evaluating a request for interpretation, the DOE may consider any other source of information. The DOE on its own initiative may convene a conference, if, in its discretion, it considers that such conference will advance its evaluation of the request.

(2) The DOE shall issue its interpretation on the basis of the information provided in the request, unless that information is supplemented by other information brought to the attention of the General Counsel or a Regional Counsel during the proceeding. The

interpretation shall, therefore, depend for its authority on the accuracy of the factual statement and may be relied upon only to the extent that the facts of the actual situation correspond to those upon which the interpretation was based.

(3) If the DOE determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the person requesting the interpretation, the DOE may refuse to issue an interpretation.

(b) *Criteria.* (1) The DOE shall base an interpretation on the FEA and EPAA and the regulations and published rulings of the DOE as applied to the specific factual situation.

(2) The DOE shall take into consideration previously issued interpretations dealing with the same or a related issue.

§ 205.85 Decision and effect.

(a) An interpretation may be issued after consideration of the request for interpretation and other relevant information received or obtained during the proceeding.

(b) The interpretation shall contain a statement of the information upon which it is based and a legal analysis of and conclusions regarding the application of rulings, regulations and other precedent to the situation presented in the request.

(c) Only those persons to whom an interpretation is specifically addressed and other persons upon whom the DOE serves the interpretation and who are directly involved in the same transaction or act may rely upon it. No person entitled to rely upon an interpretation shall be subject to civil or criminal penalties stated in Subpart P of this part for any act taken in reliance upon the interpretation, notwithstanding that the interpretation shall thereafter be declared by judicial or other competent authority to be invalid.

(d) An interpretation may be rescinded or modified at any time. Rescission or modification may be effected by notifying persons entitled to rely on the interpretation that it is rescinded or modified. This notification

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shall include a statement of the reasons for the rescission or modification and, in the case of a modification, a restatement of the interpretation as modified.

(e) An interpretation is modified by a subsequent amendment to the regulations or ruling to the extent that it is inconsistent with the amended regulation or ruling.

(f)(1) Any person aggrieved by an interpretation may submit a petition for reconsideration to the General Counsel within 30 days of service of the interpretation from which the reconsideration is sought. There has not been an exhaustion of administrative remedies until a period of 30 days from the date of service of the interpretation has elapsed without receipt by the General Counsel of a petition for reconsideration or, if a petition for reconsideration of the interpretation has been filed in a timely manner, until that petition has been acted on by the General Counsel. However, a petition to which the General Counsel does not respond within 60 days of the date of receipt thereof, or within such extended time as the General Counsel may prescribe by written notice to the petitioner concerned within that 60 day period, shall be considered denied.

(2) A petition for reconsideration may be summarily denied if—

(i) It is not filed in a timely manner, unless good cause is shown; or

(ii) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the interpretation was erroneous in fact or in law, or that it was arbitrary or capricious.

(3) The General Counsel may deny any petition for reconsideration if the petitioner does not establish that—

(i) The petition was filed by a person aggrieved by an interpretation;

(ii) The interpretation was erroneous in fact or in law; or

(iii) The interpretation was arbitrary or capricious. The denial of a petition shall be a final order of which the petitioner may seek judicial review.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275,

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as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.86 Appeal.

There is no administrative appeal of an interpretation.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [43 FR 14437, Apr. 6, 1978]

Subpart G—Other Proceedings

§ 205.90 Purpose and scope.

(a) *In general.* This subpart establishes the procedures for the filing of such other applications, petitions, or requests as may be required or permitted from time to time under the provisions of this chapter, but (except to the extent otherwise provided in this subpart) does not supplant any procedures presently provided for in this part, including petitions to the Office of Hearings and Appeals filed in accordance with Subpart R of this part. This subpart specifically provides for applications by motor gasoline retail sales outlets in accordance with the provisions of § 211.106 and petitions to use multiple allocation fractions in accordance with the provisions of § 211.10(b).

(b) *Petitions under § 212.78.* This subpart also establishes general procedures for applications for certifications in accordance with the provisions of § 212.78. However, §§ 205.95 and 205.96 of this subpart shall not be applicable to such applications. Such applications shall be governed exclusively by § 205.98, in lieu of §§ 205.95 and 205.96.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-

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385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

[43 FR 33687, Aug. 1, 1978, as amended at 44 FR 51151, Aug. 30, 1979]

§ 205.91 What to file.

(a) A person filing under this subpart shall file an "Application (petition or request, if applicable) for (identify action requested)," which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the person wishes to claim confidential treatment for any information contained in the application, petition, request, or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

§ 205.92 Where to file.

(a) All applications, petitions or requests not described in other subparts of this part shall be filed in accordance with any ERA regulations or forms and instructions that relate thereto. If no such regulations or forms and instructions have been issued by the ERA, all such applications, petitions or requests shall be filed with the ERA office specified in § 205.13, at the address provided in § 205.12.

(b) An application by a motor gasoline retail sales outlet in accordance with the provisions § 211.106 shall be filed with the Regional Office for the region in which the retail sales outlets are located. Applications which involve retail sales outlets located in more than one region shall be filed with the appropriate Regional Office in each affected region.

(c) An application to use multiple allocation fractions in accordance with the provisions of § 211.10(b) shall be

filed with the DOE National Office at the address provided in § 205.12.

(d) An application for certification of a tertiary enhanced recovery project in accordance with the provisions of § 212.78 shall be filed with the Administrator, Economic Regulatory Administration, Department of Energy, Attention: Manager, Tertiary Enhanced Recovery Program, Office of Fuels Regulation. If the application is determined to be sufficiently complete and adequate to commence processing, the ERA shall provide formal notice in writing to the applicant that such application has been accepted for processing.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 33687, Aug. 1, 1978]

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(a) Any application, petition or request filed under this subpart shall contain all the information that the DOE by regulation, ruling, form or other instruction may require.

(b) An application by a motor gasoline retail sales outlet in accordance with § 211.106 of this chapter shall conform to the requirements of DOE Ruling 1974-13 and any future amendments to or modifications of that ruling.

§ 205.94 DOE evaluation.

(a) *Processing.* (1) The DOE may initiate an investigation of any statement in an application, petition or request and utilize in its evaluation any relevant facts obtained by such investigation. The DOE may solicit and accept submissions from third persons relevant to any application, petition or request provided that the person who filed is afforded an opportunity to respond to all third person submissions. In evaluating an application, petition or request, the DOE may consider any other source of information. The DOE

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on its own initiative may convene a conference, if, in its discretion, it considers that such conference will advance its evaluation of the application, petition or request.

(2) If the DOE determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, the DOE may dismiss the application, petition or request without prejudice. If the failure to supply additional information is repeated or willful, the DOE may dismiss the application, petition or request with prejudice.

(b) *Criteria.* In considering an application, petition or request, the DOE will apply the criteria stated in any DOE regulation, ruling, form or instruction that relates to such application, petition or request.

§ 205.95 Decision and order.

(a) Upon consideration of the application, petition or request and other relevant information received or obtained during the proceeding, if DOE action is required, the DOE shall issue an appropriate order.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the order. The order shall provide that any person aggrieved thereby may file an appeal with the DOE Office of Exceptions and Appeals or the appropriate Regional Office in accordance with Subpart H of this part.

(c) The DOE shall serve a copy of the order upon the person who filed and any other person who participated in the proceeding and may serve a copy of the order upon any person who is readily identifiable as one who is aggrieved by said order.

§ 205.96 Timeliness.

If the DOE fails to take action on any application filed under this subpart within 90 days of filing, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in this subpart.

§ 205.97 Appeal.

Any person aggrieved by an order issued by the DOE under this subpart

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may file an appeal with the DOE Office of Exceptions and Appeals or with the appropriate Regional Office in accordance with Subpart H of this part. The appeal shall be filed within 30 days of service of the order from which the appeal is taken. There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H of this part and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

§ 205.98 Decision and review concerning applications under § 212.78.

(a) Upon consideration of the application for certification and other relevant evidence received or obtained during the proceeding, the ERA, in the person of the certifying authority identified in § 212.78, shall issue a proposed decision and order. Such proposed decision and order shall contain the relevant findings and conclusions, and shall be served upon the applicant and published by notice in the *FEDERAL REGISTER*, except that any matters contained in such proposed decision and order which are exempt from disclosure under 5 U.S.C. 552(b)(4) shall be deleted from the published decision and order.

(b) Any interested person may file a written objection to such proposed decision and order: *Provided*, That such objection is received by the certifying authority within 30 calendar days from the date of publication in the *FEDERAL REGISTER* of the proposed decision and order. If no objection is received within that period, the certifying authority may consider such proposed decision and order to be final, and may sign such order, unless such certifying authority determines otherwise on his own motion. No certification under § 212.78 shall be considered final until the certifying authority signs a final decision and order to that effect and such final decision and order has either not been appealed within the time prescribed under § 205.97 or has been affirmed on appeal.

(c) Any objection shall be signed by the party submitting it, shall state the grounds upon which objection is made,

and shall set forth any evidence substantiating such objection. The certifying authority shall consider any timely objection, and may in his discretion provide for formal or informal written submissions or oral presentations in connection therewith. Upon review of the matters submitted, the certifying authority may proceed to issue a final decision and order in the form proposed, issue a modified proposed or final decision and order, withhold further action upon the matter until other pertinent matters are resolved or clarified, or take such other action as is appropriate under the circumstances. The certifying authority shall notify the interested parties of the action taken and shall serve a copy of any final or modified proposed decision and order upon the party or parties.

(d) Appeal of a final decision and order issued under this section may be taken in accordance with the provisions of § 205.97: *Provided*, That no person who failed to make objection to a proposed decision and order as provided in this section may appeal a final decision and order issued in substantially the form proposed: *And provided further*, That a person making objection to a proposed decision and order may not raise any new grounds on appeal if the final decision and order is issued in substantially the form proposed.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [43 FR 33687, Aug. 1, 1978]

Subpart H—Appeal

§ 205.100 Purpose and scope.

(a)(1) This subpart establishes the procedures for the filing of an administrative appeal of DOE actions taken under Subparts B, C, D, E, G, O, or T of this part, Subpart I of Part 212, or actions of the Director of Oil Imports specified in paragraph (a)(2) of this

section, and the consideration of such appeal by the DOE. Appeals of orders issued by State Offices shall be in accordance with Subpart R.

(2) Actions of the Director of Oil Imports subject to appeal under this subpart are:

(i) Actions taken erroneously on applications for allocations of imports under Part 213 of this chapter; and

(ii) Denial of refunds pursuant to § 213.35(d) of license fees, whether in whole or in part, theretofore paid by a person.

(b) A person who has appeared before the DOE in connection with a matter arising under Subparts B, C, D, E, G, O, or T of this part, Subpart I of Part 212, or actions of the Director of Oil Imports specified in paragraph (a)(2) of this section, has not exhausted his administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [40 FR 36557, Aug. 21, 1975, as amended at 41 FR 22343, June 3, 1976; 43 FR 14437, Apr. 6, 1978]

§ 205.101 Who may file.

Any person aggrieved by an order issued by the DOE under Subparts B, C, D, E, G, O, or T of this part, Subpart I of Part 212, or actions of the Director of Oil Imports specified in § 205.100(a)(2) may file an appeal under this subpart.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [40 FR 36557, Aug. 21, 1975, as amended at 43 FR 14437, Apr. 6, 1978]

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§ 205.102 What to file.

(a) A person filing under this subpart shall file an "Appeal of Order", which should be clearly labeled as such both on the appeal and on the outside of the envelope in which the appeal is transmitted, and shall be in writing and signed by the person filing the appeal. The appellant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the appellant wishes to claim confidential treatment for any information contained in the appeal or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.103 Where to file.

(a) When the order upon which the appeal is based was issued by the DOE National Office, the appeal shall be filed with the Office of Exceptions and Appeals at the address provided in § 205.12.

(b) When the order upon which the appeal is based was issued by a Regional Office, the appeal shall be filed with that Regional Office at the address provided in § 205.12.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.104 Notice.

(a) The appellant shall send by United States mail a copy of the

appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to each person who is reasonably ascertainable by the appellant as a person who will be aggrieved by the DOE action sought, including those who participated in the prior proceeding. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the DOE office with which the appeal was filed within 10 days. The appeal filed with the DOE shall include certification to the DOE that the appellant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the appeal was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if an appellant determines that compliance with paragraph (a) of this section would be impracticable, the appellant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the appeal a description of the persons or class or classes of persons to whom notice was not sent. The DOE may require the appellant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) The DOE shall serve notice on any other person readily identifiable by the DOE as one who will be aggrieved by the DOE action sought and may serve notice on any other person that written comments regarding the appeal will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the DOE with respect to an appeal filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to the appellant. The person shall certify to the DOE that it has complied with the requirements of

this paragraph. The DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 205.105 Contents.

(a) The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It shall include a discussion of all relevant authorities, including, but not limited to, DOE rulings, regulations, interpretations and decisions on appeals and exceptions relied upon to support the appeal. If the appeal includes a request for relief based on significantly changed circumstances, there shall be a complete description of the events, acts, or transactions that comprise the significantly changed circumstances, and the appellant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding. For purposes of this subpart, the term "significantly changed circumstances" shall mean:

(1) The discovery of material facts that were not known or could not have been known at the time of the prior proceeding;

(2) The discovery of a law, regulation, interpretation, ruling, order or decision on an appeal or an exception that was in effect at the time of the proceeding upon which the order or interpretation is based and which, if such had been made known to DOE, would have been relevant to the proceeding and would have substantially altered the outcome; or

(3) A substantial change in the facts or circumstances upon which an outstanding and continuing order affecting the appellant was issued, which change has occurred during the interval between issuance of the order and the date of the appeal and was caused by forces or circumstances beyond the control of the appellant.

(b) A copy of the order that is the subject of the appeal shall be submitted with the appeal.

(c) The appellant shall state whether to the best of his knowledge the same or a related issue, act or transac-

tion that is the subject of the appeal has been or presently is being considered or investigated by any DOE office, other Federal agency, department or instrumentality; or by a State Office, a state or municipal agency or court, or by any law enforcement agency; including, but not limited to, a consideration or investigation in connection with a DOE proceeding described in this part, other than the proceeding from which the appeal is taken. In addition, the appellant shall state whether contact has been made by the appellant or one acting on his behalf with any person who is employed by the DOE or any State Office subsequent to service of the order that is being appealed with regard to the issue, act or transaction that is the subject of the appeal; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or dates of the contact. An appellant shall comply with this paragraph in lieu of § 205.9(e).

(d) The appellant shall state whether he requests or intends to request that there be a conference or hearing regarding the appeal. Any request not made at the time the appeal is filed shall be made as soon thereafter as possible, to insure that the conference or hearing is held when it will be most beneficial. The request and the DOE's determination regarding it shall be made in accordance with Subpart M of this part.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.106 DOE Evaluation.

(a) *Processing.* (1) The DOE may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation. With respect to appeals of actions specified in

§ 205.100(a)(2), the Office of Exceptions and Appeals shall forward to the Director of Oil Imports copies of all submissions to it, and shall provide the Director opportunity to comment on the appeal. The DOE may solicit and accept submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the DOE may consider any other source of information. The DOE on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If the DOE determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the DOE may dismiss the appeal with leave to amend within a specified time. If the failure to supply additional information is repeated or willful, the DOE may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by § 205.104, the DOE may dismiss the appeal without prejudice.

(3) *Failure to satisfy requirements.*

(i) If the appellant fails to satisfy the requirements of paragraph (b)(1) of this section, the DOE may issue an order denying the appeal. The order shall state the grounds for the denial and a copy of the order shall be served upon the appellant and any other person who participated in the proceeding.

(ii) The order denying the appeal shall become a final order of the DOE within 10 days of its service upon the appellant, unless within such 10-day period an amendment to the appeal that corrects the deficiencies identified in the order is filed with the Office of Exceptions and Appeals or the appropriate Regional Office.

(iii) Within 10 days of the filing of such amendment, as provided in paragraph (b)(1) of this section, the DOE shall notify the appellant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies, that notice shall be an order dismissing the appeal as amended. Such order shall be a

final order of the DOE of which appellant may seek judicial review.

(b) *Criteria.* (1) An appeal may be summarily denied if—

(i) It is not filed in a timely manner, unless good cause is shown; or

(ii) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the DOE action was erroneous in fact or in law, or that it was arbitrary or capricious.

(2) The DOE may deny any appeal if the appellant does not establish that—

(i) The appeal was filed by a person aggrieved by a DOE action;

(ii) The DOE's action was erroneous in fact or in law; or

(iii) The DOE's action was arbitrary or capricious.

The denial of an appeal shall be a final order of DOE of which the appellant may seek judicial review.

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36557, Aug. 21, 1975]

§ 205.107 Decision and order.

(a) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, the DOE shall enter an appropriate order, which may include the modification of the order that is the subject of the appeal.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the order. The order shall state that it is a final order of the DOE of which the appellant may seek judicial review.

(c) The DOE shall serve a copy of the order upon the appellant, any other person who participated in the proceeding and upon any other person readily identifiable by the DOE as one who is aggrieved by such order.

(d) A copy of each order, with such modification as is necessary to insure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, will be filed in the public docket room described in § 205.15. If such copy contains information that has been claimed by an appellant or other person, to be confidential, notice of the DOE's intention to place a copy in the docket room and an opportunity to respond shall be

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given to such person no less than five days prior to its placement in such room.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.108 Appeal of a remedial order.

The appeal of a remedial order shall be in accordance with the procedures stated in this subpart, *except*:

(a) The appeal must be filed within 10 days of the service of the remedial order; and

(b) If the appeal is of a remedial order that was issued subsequent to a notice of probable violation that relates to an order or interpretation previously issued by the DOE, with respect to which there was an exhaustion of administrative remedies, no issues will be considered on the current appeal that were raised in that prior proceeding.

(c) If an issue raised on an appeal of a remedial order is also being considered in connection with any other DOE proceeding, the DOE may consolidate such issues and consider them in the appellate proceeding for the remedial order.

§ 205.109 Timeliness.

(a) When the DOE has received all substantive information deemed necessary to process any appeal filed under this subpart, the DOE shall serve notice of that fact upon the appellant and all other persons who received notice of the proceeding pursuant to the provisions of § 205.104; and if the DOE fails to take action on the appeal within 90 days of serving such notice, the appellant may treat the appeal as having been denied in all respects and may seek judicial review thereof.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the DOE fails to take action on the appeal within 120 days of the filing of the appeal, the appellant may treat it as

having been denied in all respects and may seek judicial review thereof.

Subpart I—Stay and Temporary Exception

AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, Pub. L. 95-91; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91, as amended, Pub. L. 95-620; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 36935, June 25, 1979, unless otherwise noted.

§ 205.120 Purpose and scope of relief.

(a) This subpart establishes the procedures for applying for a stay or a temporary exception. It also specifies the nature of the relief which may be effectuated through the approval of a stay or temporary exception.

(b) An application for a stay or temporary exception will be considered if it is incident to a submission which the DOE procedural regulations specify shall be filed with the Office of Hearings and Appeals. An application for stay may also be considered if the stay is requested pending judicial review of an order issued by the Office of Hearings and Appeals.

(c) All applicable DOE orders, regulations, rulings, and generally applicable requirements shall be complied with unless and until an application for a stay or temporary exception is granted.

(d) The Office of Hearings and Appeals may in its discretion regard an Application for Stay as seeking a temporary exception if it concludes that a temporary exception is the more appropriate remedy. Similarly, the Office of Hearings and Appeals may regard a submission labeled as an Application for Temporary Exception as an Application for Stay.

§ 205.121 What to file.

(a) A person filing under this subpart shall file an "Application for

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Stay," or an "Application for Temporary Exception" which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted. The application shall be in writing and signed by the person filing it. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

§ 205.122 Where to file.

(a) An application for stay of a DOE order incident to an appeal from the order shall be filed with the Office of Hearings and Appeals or with the appropriate Regional Office of Hearings and Appeals at the address provided in § 205.12.

(b) An application for stay of any or all DOE regulations, rulings, or generally applicable requirements incident to an application for an exception therefrom shall be filed with the Office of Hearings and Appeals or with the appropriate Regional Office of Hearings and Appeals as specified in § 205.52 at the address provided in § 205.12.

(c) An application for temporary exception incident to an application for exception shall be filed with the Office of Hearings and Appeals or with the appropriate Regional Office of Hearings and Appeals as specified in § 205.52 at the address provided in § 205.12.

(d) An application for stay of a DOE order or of the application of any DOE regulations, rulings or generally applicable requirements pending judicial review shall be filed with the office that issued the order of which judicial review is sought.

§ 205.123 Notice.

(a) An applicant for stay or temporary exception shall notify each person readily identifiable as one who will be directly aggrieved by the DOE action sought that it has filed an application for stay or an application for

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temporary exception. The applicant shall serve the application on each identified person and shall notify each such person that the Office of Hearings and Appeals will receive and endeavor to consider, subject to time constraints imposed by the urgency of the proceeding, written comments on the application that are submitted immediately.

(b) Any person submitting written comments to the Office of Hearings and Appeals with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to the applicant. The person shall certify to the Office of Hearings and Appeals that it has complied with the requirements of this paragraph. The Office of Hearings and Appeals may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

(c) The Office of Hearings and Appeals shall require the applicant to take reasonable measures depending on the circumstances and urgency of the case to notify each person readily identified as one that will be directly aggrieved by the DOE action sought of the date, time and place of any hearing or other proceedings in the matter. However, if the Director of the Office of Hearings and Appeals or his designee concludes that the circumstances presented by the applicant justify immediate action, the Office of Hearings and Appeals may issue a Decision on the application for stay or temporary exception prior to receipt of written comments or the oral presentation of views by adversely affected parties.

§ 205.124 Contents.

(a) An application for stay or temporary exception shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the application and to the DOE action sought. Such facts shall include, but not be limited to, all information that relates to satisfaction of the criteria in § 205.125(b).

(b) The application shall include a description of the proceeding incident to which the stay or temporary exception is being sought. This description shall contain a discussion of all DOE actions relevant to the proceeding.

(c) The applicant shall state whether he requests that a conference or hearing be convened regarding the application.

§ 205.125 DOE evaluation.

(a) *Processing.* (1) The Office of Hearings and Appeals may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The Office of Hearings and Appeals may solicit and accept submissions from third persons relevant to an application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the Office of Hearings and Appeals may also consider any other source of information.

(2) If the Office of Hearings and Appeals determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the Office of Hearings and Appeals may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the Office of Hearings and Appeals may dismiss the application with prejudice.

(3) The Office of Hearings and Appeals shall process applications for stay and temporary exception as expeditiously as possible. When administratively feasible, the Office of Hearings and Appeals shall grant or deny an application for stay or temporary exception within 10 business days after receipt of the application.

(4) Notwithstanding any other provision of the DOE Regulations the Office of Hearings and Appeals may make a decision on an application for stay or temporary exception prior to the receipt of written comments.

(b) *Criteria.* The criteria to be considered and weighed by the Office of Hearings and Appeals in determining whether a stay or temporary exception should be granted are:

(1) Whether a showing has been made that an irreparable injury will result in the event that the stay or temporary exception is denied;

(2) Whether a showing has been made that a denial of the stay or temporary exception will result in a more immediate hardship or inequity to the applicant than to the other persons affected by the proceeding;

(3) Whether a showing has been made that it would be desirable for public policy reasons to grant immediate relief pending a decision on the merits of the underlying appeal or exception application;

(4) Whether a showing has been made that it is impossible for the applicant to fulfill the requirements of an outstanding order or regulatory provision; and

(5) Whether a showing has been made that there is a strong likelihood of success on the merits.

§ 205.126 Decision and order with regard to applications for stay.

(a) In considering applications for stay the Director of the Office of Hearings and Appeals or his designee may order the submission of additional information and conduct hearings or conferences either in response to requests by parties in the proceeding or on his own initiative.

(b) In reaching a decision with respect to an application for stay, the Office of Hearings and Appeals shall consider all relevant information in the record. An application for stay may be decided by the issuance of an Order either during the course of a hearing or conference in which an official transcript is maintained or in a separate written Decision and Order. Any such order shall include a statement of the relevant facts and the legal basis of the decision.

(c) The approval or denial of a stay is not an order of the DOE that is subject to administrative review, except as provided in § 205.199D(h)(2).

(d) In its discretion and upon a determination that it would be desirable to do so in order to further the objectives stated in the regulations or in the statutes the DOE is responsible for administering, the Office of Hear-

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ings and Appeals may order a stay on its own initiative.

§ 205.127 Temporary stay.

(a) The Director of the Office of Hearings and Appeals or his designee may issue an order granting a temporary stay if he determines that an applicant has made a compelling showing that it would incur an irreparable injury unless immediate stay relief is granted pending the submission of and determination on an application for stay submitted pursuant to this subpart. If he concludes that a showing has been made that a temporary stay should be granted, the Director of the Office of Hearings and Appeals or his designee may waive any other procedural requirement of this Part.

(b) An application for temporary stay shall be labeled as such on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. It shall include a description of the proceeding incident to which the stay is being sought and of the facts and circumstances which support the applicant's claim that it will incur an irreparable injury unless immediate stay relief is granted. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this section. The Office of Hearings and Appeals may on its own initiative issue an order granting a temporary stay upon a finding that a person will incur an immediate irreparable injury or that the public interest will be adversely affected to a substantial extent unless a temporary stay is ordered.

(c) An order granting a temporary stay shall expire by its terms within twenty (20) business days after its issuance, unless the Office of Hearings and Appeals specifies a shorter expiration date.

(d) The grant or denial of a temporary stay is not an order of the DOE subject to administrative review, except as provided in § 205.199D(h)(2).

§ 205.128 Temporary exception.

(a) After considering the factors set forth in § 205.125(b), the Director of the Office of Hearings and Appeals or

his designee may issue an Order granting a temporary exception to an applicant. A temporary exception may implement on an immediate basis any relief appropriate to the application and available in response to an application for exception filed pursuant to Subpart D. A temporary exception may also order any person subject to the jurisdiction of the DOE under Part 211 or Part 212 to take action which the Office of Hearings and Appeals determines to be appropriate in order to alleviate the adverse impact which the applicant for exception relief claims would otherwise occur. The action referred to in this subparagraph includes but is not limited to an order to a supplier to sell crude oil or a petroleum product to a firm at a price specified in or determined pursuant to a temporary exception decision.

(b) A temporary exception may, in the discretion of the Office of Hearings and Appeals, remain in effect until a final Decision and Order is issued with respect to the Application for Exception filed or to be filed by the applicant.

(c) In considering applications for temporary exception, the Director of the Office of Hearings and Appeals or his designee may order the submission of additional information and conduct conferences or hearings either in response to requests by the parties or on his own initiative.

(d) An application for temporary exception shall include a description of the proceeding incident to which the temporary exception is being sought and of the facts and circumstances which support the applicant's claim that on balance, it satisfies the criteria set forth in § 205.125(b). In reaching a decision with respect to an application for temporary exception, the Office of Hearings and Appeals shall consider all relevant information in the record. An application for temporary exception may be decided by the issuance of an Order either during the course of a hearing or conference in which an official transcript is maintained or in a separate Decision and Order. Any such Order shall include a statement of the relevant facts and the legal basis of the decision.

(e) A temporary exception shall, to the extent practicable, be issued only after notice to each person that can be readily identified as one that will be directly aggrieved by the temporary exception decision. However, if a showing is made that immediate action is necessary to prevent an irreparable injury to the applicant or to the public interest the Director of the Office of Hearings and Appeals or his designee may waive the notice requirements for applications for temporary exception that are otherwise specified in this part and issue an immediate decision with regard to the application for temporary exception. The Office of Hearings and Appeals may also on its own initiative issue an order granting a temporary exception upon a finding that a person will incur an immediate irreparable injury if such an order is not issued or that the public interest will be adversely affected to a substantial extent unless a temporary exception is approved. Any firm that is adversely affected to a direct and substantial extent by the issuance of a temporary exception and did not have notice of the pendency of the proceeding may request a reconsideration of the determination within 10 days of service of the temporary exception order. The Office of Hearings and Appeals shall decide any such request for reconsideration within twenty (20) business days.

(f) An order granting an application for temporary exception shall automatically expire within twenty (20) business days after issuance unless, within that period of time or within an earlier period if so specified by the Office of Hearings and Appeals, the applicant files an Application for Exception pursuant to Subpart D.

(g) The grant or denial of a temporary exception is not an order of the DOE subject to administrative review.

Subpart J—Modification or Rescission

§ 205.130 Purpose and scope.

This subpart establishes the procedures for the filing of an application for modification or rescission of a DOE order. An application for modification or rescission is a summary proceeding that will be initiated only if

the criteria described in § 205.135(b) are satisfied.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.131 What to file.

(a) A person filing under this subpart shall file an "Application for Modification (or Rescission)", which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted under this subpart, the procedures set out in § 205.9(f) shall apply.

§ 205.132 Where to file.

(a) When the order sought to be modified or rescinded was issued by the DOE National Office, the application shall be filed with the Office of Exceptions and Appeals at the address provided in § 205.12.

(b) When the order sought to be modified or rescinded was issued by a Regional Office, the application shall be filed with that Regional Office at the address provided in § 205.12.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267)

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[39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.133 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, from which confidential information has been deleted in accordance with § 205.9(f), to each person who is reasonably ascertainable by the applicant as a person who will be aggrieved by the DOE action sought, including persons who participated in the prior proceeding. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the DOE office with which the application was filed within 10 days. The application filed with the DOE shall include certification to the DOE that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent.

The DOE may require the applicant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the **FEDERAL REGISTER**.

(c) The DOE shall serve notice on any other person readily identifiable by the DOE as one who will be aggrieved by the DOE action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the DOE with respect to

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an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to the applicant. The person shall certify to the DOE that it has complied with the requirements of this paragraph. The DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 205.134 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested action; and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted to the DOE upon its request. A copy of the order of which modification or rescission is sought shall be included with the application. When the application pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction shall be submitted.

(b) The applicant shall state whether he requests or intends to request that there be a conference regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference is held when it will be most beneficial. The request and the DOE's determination regarding it shall be made in accordance with Subpart M of this part.

(c) The applicant shall fully describe the events, acts, or transactions that comprise the significantly changed circumstances, as defined in § 205.135(b)(2), upon which the appli-

cation is based. The applicant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding.

(d) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rulings, regulations, interpretations and decisions on appeal and exception relied upon to support the action sought therein.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.135 DOE evaluation.

(a) *Processing.* (1) The DOE may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The DOE may solicit and accept submissions from third persons relevant to any application for modification or rescission provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application for modification or rescission, the DOE may convene a conference, on its own initiative, if, in its discretion, it considers that such conference will advance its evaluation of the application.

(2) If the DOE determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, the DOE may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the DOE may dismiss the application with prejudice. If the applicant fails to provide the notice required by § 205.133, the DOE may dismiss the application without prejudice.

(3) *Failure to satisfy requirements.*

(i) If the applicant fails to satisfy the requirements of paragraph (b)(1) of

this section, the DOE shall issue an order denying the application. The order shall state the grounds for the denial.

(ii) The order denying the application shall become final within 10 days of its service upon the applicant, unless within such 10 days period an amendment to correct the deficiencies identified in the order is filed with the Office of Exceptions and Appeals or the appropriate Regional Office.

(iii) Within 10 days of the filing of such amendment, the DOE shall notify the applicant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies, the notice shall be an order dismissing the application as amended. Such order shall be a final order of the DOE of which the applicant may seek judicial review.

(b) *Criteria.* (1) An application for modification or rescission of an order shall be processed only if:

(i) The application demonstrates that it is based on significantly changed circumstances; and

(ii) The 30-day period within which a person may file an appeal has lapsed or, if an appeal has been filed, a final order has been issued.

(2) For purposes of this subpart, the term "significantly changed circumstances" shall mean:

(i) The discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) The discovery of a law, regulation, interpretation, ruling, order or decision on appeal or exception that was in effect at the time of the proceeding upon which the application is based and which, if such had been made known to the DOE, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the DOE affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was

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caused by forces or circumstances beyond the control of the applicant.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267) [39 FR 35489, Oct. 1, 1974, as amended at 43 FR 14437, Apr. 6, 1978]

§ 205.136 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the DOE shall issue an order granting or denying the application.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the order. The order shall state that it is a final order of which the applicant may seek judicial review.

(c) The DOE shall serve a copy of the order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the DOE as one who is aggrieved by such order.

§ 205.137 Timeliness.

(a) If the DOE fails to take action on any application filed under this subpart within 90 days of filing, the applicant may treat the application as having been denied in all respects and may seek judicial review thereof.

Subpart K—Rulings

§ 205.150 Purpose and scope.

This subpart establishes the criteria for the issuance of interpretative rulings by the General Counsel. All rulings shall be published in the *FEDERAL REGISTER*. Any person is entitled to rely upon such ruling, to the extent provided in this subpart.

§ 205.151 Criteria for issuance.

(a) A ruling may be issued, in the discretion of the General Counsel, whenever there have been a substantial number of inquiries with regard to

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similar factual situations or a particular section of the regulations.

(b) The General Counsel may issue a ruling whenever it is determined that it will be of assistance to the public in applying the regulations to a specific situation.

§ 205.152 Modification or rescission.

(a) A ruling may be modified or rescinded by:

(1) Publication of the modification or rescission in the *FEDERAL REGISTER*; or

(2) A rulemaking proceeding in accordance with Subpart L of this part.

(b) Unless and until a ruling is modified or rescinded as provided in paragraph (a) of this section, no person shall be subject to the sanctions or penalties stated in Subpart P of this part for actions taken in reliance upon the ruling, notwithstanding that the ruling shall thereafter be declared by judicial or other competent authority to be invalid. Upon such declaration, no person shall be entitled to rely upon the ruling.

§ 205.153 Comments.

A written comment on or objection to a published ruling may be filed at any time with the General Counsel at the address specified in § 205.12.

§ 205.154 Appeal.

There is no administrative appeal of a ruling.

Subpart L—Rulemaking

§ 205.160 Purpose and scope.

(a) This subpart establishes the procedures that govern a rulemaking proceeding. The initiation of a rulemaking proceeding is within the sole discretion of the DOE.

(b) Rulemaking by the DOE shall be in accordance with the Administrative Procedure Act (5 U.S.C. 551, et. seq. (1970)), the FEAA, and the EPCA.

[39 FR 35489, Oct. 1, 1974, as amended at 41 FR 36647, Aug. 31, 1976]

§ 205.161 What to file.

(a) *Comments in connection with a rulemaking.* Any comments filed in

connection with a rulemaking shall be filed in accordance with the instructions in the Notice of Proposed Rulemaking published in the **FEDERAL REGISTER**. Such comments shall be in writing and signed by the person filing them.

(b) *Petition for rulemaking.* (1) Any person may at any time file a petition regarding any DOE, regulation or amendment thereto or, by letter, request that a rulemaking proceeding be instituted. Such petition or request shall be signed by the person filing it.

(2) Upon due consideration of a petition for rulemaking, expressly designated as such, the DOE shall either: (i) Institute a rulemaking as proposed or as modified in its discretion; (ii) notify the petitioner in writing that it does not intend to institute a rulemaking as proposed or as modified and stating the reasons therefore; or (iii) notify the petitioner in writing that the matter is under continuing consideration and that no decision can be made at that time because of the inadequacy of available information, changing circumstances or other reasons as set forth therein.

§ 205.162 Where to file.

All comments filed in connection with a rulemaking shall be submitted in accordance with the instructions in the Notice of Proposed Rulemaking. Petitions for rulemaking relating to the functions of the Economic Regulatory Administration (ERA) including, but not limited to, those administered under Parts 210, 211, 212, 213, and 214 of 10 CFR shall be filed with the Economic Regulatory Administration National Office at the address provided in § 205.12 and addressed to the attention of the Assistant Administrator for Regulations and Emergency Planning. Copies of all petitions for rulemaking filed with ERA shall also be filed with Office of General Counsel at the address indicated in § 205.12, addressed to the attention of the Deputy General Counsel for Regulations. Any other petition or request shall be filed with the Office of General Counsel at the address indicated in § 205.12, addressed to the attention of the Deputy General Counsel for Regulations.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

[45 FR 37684, June 4, 1980]

Subpart M—Conferences, Hearings, and Public Hearings

§ 205.170 Purpose and scope.

This subpart establishes the procedures for requesting and conducting a DOE conference, hearing, or public hearing. Such proceedings shall be convened in the discretion of the DOE, consistent with the requirements of the FEAA.

§ 205.171 Conferences.

(a) The DOE in its discretion may direct that a conference be convened, on its own initiative or upon request by a person, when it appears that such conference will materially advance the proceeding. The determination as to who may attend a conference convened under this subpart shall be in the discretion of the DOE, but a conference will usually not be open to the public.

(b) A conference may be requested in connection with any proceeding of the DOE by any person who might be aggrieved by that proceeding. The request may be made in writing or verbally, but must include a specific showing as to why such conference will materially advance the proceeding. The request shall be addressed to the DOE office that is conducting the proceeding.

(c) A conference may only be convened after actual notice of the time, place, and nature of the conference is provided to the person who requested the conference.

(d) When a conference is convened in accordance with this section, each person may present views as to the

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issue or issues involved. Documentary evidence may be presented at the conference, but will be treated as if submitted in the regular course of the proceedings. A transcript of the conference will not usually be prepared. However, the DOE in its discretion may have a verbatim transcript prepared.

(e) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless the DOE in its discretion determines that such would be advisable.

§ 205.172 Hearings.

(a) The DOE in its discretion may direct that a hearing be convened on its own initiative or upon request by a person, when it appears that such hearing will materially advance the proceedings. The determination as to who may attend a hearing convened under this subpart shall be in the discretion of DOE, but a hearing will usually not be open to the public. Where the hearing involves a matter arising under Part 213, the Director of Oil Imports shall be notified as to its time and place, in order that he or his representative may present views as to the issue or issues involved.

(b) A hearing may only be requested in connection with an application for an exception or an appeal. Such request may be by the applicant, appellant, or any other person who might be aggrieved by the DOE action sought. The request shall be in writing and shall include a specific showing as to why such hearing will materially advance the proceeding. The request shall be addressed to the DOE office that is considering the application for an exception or the appeal.

(c) The DOE will designate an agency official to conduct the hearing, and will specify the time and place for the hearing.

(d) A hearing may only be convened after actual notice of the time, place, and nature of the hearing is provided both to the applicant or appellant and to any other person readily identifiable by the DOE as one who will be aggrieved by the DOE action involved. The notice shall include, as appropriate:

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(1) A statement that such person may participate in the hearing; or

(2) A statement that such person may request a separate conference or hearing regarding the application or appeal.

(e) When a hearing is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the hearing, but will be treated as if submitted in the regular course of the proceedings. A transcript of the hearing will not usually be prepared. However, the DOE in its discretion may have a verbatim transcript prepared.

(f) The official conducting the hearing may administer oaths and affirmations, rule on the presentation of information, receive relevant information, dispose of procedural requests, determine the format of the hearing, and otherwise regulate the course of the hearing.

(g) Because a hearing is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless the DOE in its discretion determines that such would be advisable.

[39 FR 35489, Oct. 1, 1974, as amended at 40 FR 36557, Aug. 21, 1975]

§ 205.173 Public hearings.

(a) A public hearing shall be convened incident to a rulemaking:

(1) When the proposed rule or regulation is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses; or

(2) When the DOE determines that a public hearing would materially advance the consideration of the issue. A public hearing may be requested by any interested person in connection with a rulemaking proceeding, but shall only be convened on the initiative of the DOE unless otherwise required by statute.

(b) A public hearing may be convened incident to any proceeding when the DOE in its discretion determines that such public hearing would materially advance the consideration of the issue.

(c) A public hearing may only be convened after publication of a notice in the **FEDERAL REGISTER**, which shall include a statement of the time, place, and nature of the public hearing.

(d) Interested persons may file a request to participate in the public hearing in accordance with the instructions in the notice published in the **FEDERAL REGISTER**. The request shall be in writing and signed by the person making the request. It shall include a description of the person's interest in the issue or issues involved and of the anticipated content of the presentation. It shall also contain a statement explaining why the person would be an appropriate spokesperson for the particular view expressed.

(e) The DOE shall appoint a presiding officer to conduct the public hearing. An agenda shall be prepared that shall provide, to the extent practicable, for the presentation of all relevant views by competent spokespersons.

(f) A verbatim transcript shall be made of the hearing. The transcript, together with any written comments submitted in the course of the proceeding, shall be made available for public inspection and copying in the public docket room, as provided in § 205.15.

(g) The information presented at the public hearing, together with the written comments submitted and other relevant information developed during the course of the proceeding, shall provide the basis for the DOE decision.

Subpart N—[Reserved]

Subpart O—Notice of Probable Violation, Remedial Order, Notice of Proposed Disallowance, and Order of Disallowance

AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, Pub. L. 95-91; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, Pub. L. 95-70, Department of Energy Organization Act, Pub. L. 95-91, as amended, Pub. L. 95-620;

E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 7924, Feb. 7, 1979, unless otherwise noted.

§ 205.190 Purpose and scope.

(a) This subpart establishes the procedures for determining the nature and extent of violations of the DOE regulations in Parts 210, 211, and 212 and the procedures for issuance of a Notice of Probable Violation, a Proposed Remedial Order, a Remedial Order, an Interim Remedial Order for Immediate Compliance, a Remedial Order for Immediate Compliance, a Notice of Probable Disallowance, a Proposed Order of Disallowance, an Order of Disallowance, or a Consent Order. Nothing in these regulations shall affect the authority of DOE enforcement officials in coordination with the Department of Justice to initiate appropriate civil or criminal enforcement actions in court at any time.

(b) When any report required by the ERA or any audit or investigation discloses, or the ERA otherwise discovers, that there is reason to believe a violation of any provision of this chapter, or any order issued thereunder, has occurred, is continuing or is about to occur, the ERA may conduct an inquiry to determine the nature and extent of the violation. A Remedial Order or Order of Disallowance may be issued thereafter by the Office of Hearings and Appeals. The ERA may commence enforcement proceedings by serving a Notice of Probable Violation, a Notice of Probable Disallowance, a Proposed Remedial Order, a Proposed Order of Disallowance, or an Interim Remedial Order for Immediate Compliance.

§ 205.191 Notice of probable violation; commencement of enforcement proceedings.

(a) The ERA may begin a proceeding under this subpart by issuing a Notice of Probable Violation if the ERA has reason to believe that a violation has occurred, is continuing or is about to occur.

(b) Within 30 days after the service of a Notice of Probable Violation, the person upon whom the Notice is

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served may file a reply with the ERA office that issued the Notice of Probable Violation at the address provided in § 205.12. The ERA may extend the 30-day period for good cause shown.

(c) The reply shall be in writing and signed by the person filing it. The reply shall contain a statement of all relevant facts pertaining to the act or transaction that is the subject of the Notice of Probable Violation. The reply shall include a statement of the legal, business and other reasons for the act or transaction; a description of the act or transaction; and a discussion of the pertinent provisions and relevant facts reflected in any documents submitted with the reply. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the reply. When the Notice of Probable Violation pertains to only one step of a larger integrated transaction, the facts regarding the entire transaction shall be submitted. In further proceedings regarding this act or transaction, the Office of Hearings and Appeals will decline to consider an issue that was not raised in the reply to the Notice of Probable Violation unless good cause is shown for the failure to raise the issue.

(d) The reply shall include a discussion of the relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies.

(e) The reply should indicate whether the person requests an informal conference regarding the notice. A request for a conference must be in writing.

(f) If a person has not filed a reply with the ERA within the 30-day or other period authorized for reply, the person shall be deemed to have admitted the accuracy of the factual allegations and legal conclusions stated in the Notice of Probable Violation, and the ERA may proceed to issue a Proposed Remedial Order in accordance with § 205.192.

(g) If the ERA finds, during or after the 30-day or other period authorized for reply, that no violation has occurred, is continuing, or is about to occur, or that for any reason the issu-

ance of a Proposed Remedial Order would not be appropriate, it shall rescind the Notice of Probable Violation and inform the person to whom the Notice was issued of the rescission.

§ 205.192 Proposed remedial order.

(a) If the ERA finds, after the 30-day or other period authorized for reply to the Notice of Probable Violation, that a violation has occurred, is continuing, or is about to occur, it may issue a Proposed Remedial Order, which shall set forth the relevant facts and law.

(b) The ERA may issue a Proposed Remedial Order at any time it finds that a violation has occurred, is continuing, or is about to occur even if it has not previously issued a Notice of Probable Violation.

(c) The ERA shall serve a copy of the Proposed Remedial Order upon the person to whom it is directed. The ERA shall promptly publish a notice in the *FEDERAL REGISTER* which states the person to whom the Proposed Remedial Order is directed, his address, and the products, dollar amounts, time period, and geographical area specified in the Proposed Remedial Order. The notice shall indicate that a copy of the Proposed Remedial Order with confidential information, if any, deleted may be obtained from the ERA and that within 15 days after the date of publication any aggrieved person may file a Notice of Objection with the Office of Hearings and Appeals of accordance with § 205.193. The ERA shall mail copies of the *FEDERAL REGISTER* notice to all readily identifiable persons who are likely to be aggrieved by issuance of the Proposed Remedial Order as a final order.

(d) The Proposed Remedial Order shall set forth the proposed findings of fact and conclusions of law upon which it is based. It shall also include a discussion of the relevant authorities which support the position asserted, including rules, regulations, rulings, interpretations and previous decisions issued by DOE or its predecessor agencies. The Proposed Remedial Order shall be accompanied by a declaration executed by the DOE employee primarily knowledgeable about the facts

of the case stating that, to the best of declarant's knowledge and belief, the findings of fact are correct.

(e) The ERA may amend or withdraw a Proposed Remedial Order at its discretion prior to the date of service of a Statement of Objections in that proceeding. The date of service of the amended documents shall be considered the date of service of the Proposed Remedial Order in calculating the time periods specified in this Part 205.

§ 205.192A Burden of proof.

(a) In a Proposed Remedial Order proceeding the ERA has the burden of establishing a prima facie case as to the validity of the findings of fact and conclusions of law asserted therein. The ERA shall be deemed to meet this burden by the service of a Proposed Remedial Order that meets the requirements of § 205.192(d) and any supplemental information that may be made available under § 205.193A.

(b) Once a prima facie case has been established, a person who objects to a finding of fact or conclusion of law in the Proposed Remedial Order has the burden of going forward with the evidence. Furthermore, the proponent of additional factual representations has the burden of going forward with the evidence.

(c) Unless otherwise specified by the Director of the Office of Hearings and Appeals or his designee, the proponent of an order or a motion or additional factual representations has the ultimate burden of persuasion.

§ 205.193 Notice of Objection.

(a) Within 15 days after publication of the notice of a Proposed Remedial Order in the **FEDERAL REGISTER** any aggrieved person may file a Notice of Objection to the Proposed Remedial Order with the Office of Hearings and Appeals. The Notice shall be filed in duplicate, shall briefly describe how the person would be aggrieved by issuance of the Proposed Remedial Order as a final order and shall state the person's intention to file a Statement of Objections. No confidential information shall be included in a Notice of Objection. The DOE shall place one copy of the Notice in the Office of

Hearings and Appeals Public Docket Room.

(b) A person who fails to file a timely Notice of Objection shall be deemed to have admitted the findings of fact and conclusions of law as stated in the Proposed Remedial Order. If a Notice of Objection is not filed as provided by paragraph (a) of this section, the Proposed Remedial Order may be issued as a final order.

(c) A person who files a Notice of Objection shall on the same day serve a copy of the Notice upon the person to whom the Proposed Remedial Order is directed, the DOE Office that issued the Proposed Remedial Order, and the DOE Assistant General Counsel for Administrative Litigation.

(d) The Notice shall include a certification of compliance with the provisions of this section, the names and addresses of each person served with a copy of the Notice, and the date and manner of service.

(e) If no person files a timely Notice of Objection, ERA may request the Office of Hearings and Appeals to issue the Proposed Remedial Order as a final Remedial Order.

(f) In order to exhaust administrative remedies with respect to a Remedial Order proceeding, a person must file a timely Notice of Objection and Statement of Objections with the Office of Hearings and Appeals.

§ 205.193A Submission of ERA supplemental information.

Within 20 days after service of a Notice of Objection to a Proposed Remedial Order the ERA may serve, upon the person to whom the Proposed Remedial Order was directed, supplemental information relating to the calculations and determinations which support the findings of fact set forth in the Proposed Remedial Order.

§ 205.194 Participants; official service list.

(a) Upon receipt of a Notice of Objection, the Office of Hearings and Appeals shall publish a notice in the **FEDERAL REGISTER** which states the person to whom the Proposed Remedial Order is directed, his address and the products, dollar amounts, time period, and geographical area specified in the

Proposed Remedial Order. The notice shall state that any person who wishes to participate in the proceeding must file an appropriate request with the Office of Hearings and Appeals.

(b) The Office that issued the Proposed Remedial Order and the person to whom the Order is directed shall be considered participants before the Office of Hearings and Appeals at all stages of an enforcement proceeding. Any other person whose interest may be affected by the proceeding may file a request to participate in the proceeding with the Office of Hearings and Appeals within 20 days after publication of the notice referred to in paragraph (a) of this section. The request shall contain

(1) the person's name, address, and telephone number and similar information concerning his duly authorized representative, if any;

(2) a detailed description of the person's interest in the proceeding;

(3) the specific reasons why the person's active involvement in the proceeding will substantially contribute to a complete resolution of the issues to be considered in the proceeding;

(4) a statement of the position which the person intends to adopt in the proceeding; and

(5) a statement of the particular aspects of the proceeding, e.g. oral argument, submission of briefs, or discovery, in which the person wishes to actively participate.

(c) After considering the requests submitted pursuant to paragraph (b) of this section, the Office of Hearings and Appeals shall determine those persons who may participate on an active basis in the proceeding and the nature of their participation. Participants with similar interests may be required to consolidate their submissions and to appear in the proceeding through a common representative.

(d) Within 30 days after publication of the notice referred to in paragraph (a) of this section, the Office of Hearings and Appeals shall prepare an official service list for the proceeding. Within the same 30 day period the Office of Hearings and Appeals shall mail the official service list to all persons who filed requests to participate. For good cause shown a person may be

placed on the official service list as a non-participant, for the receipt of documents only. An opportunity shall be afforded to participants to oppose the placement of a non-participant on the official service list.

(e) A person requesting to participate after the period for submitting requests has expired must show good cause for failure to file a request within the prescribed time period.

(f) The Office of Hearings and Appeals may limit the nature of a person's participation in the proceeding, if it finds that the facts upon which the person's request was based have changed or were incorrect when stated or that the person has not been actively participating or has engaged in disruptive or dilatory conduct. The action referred to in this provision shall be taken only after notice and an opportunity to be heard are afforded.

§ 205.195 Filing and service of all submissions.

(a)(1) Statements of Objections, Responses to such Statements, and any motions or other documents filed in connection with a proceeding shall meet the requirements of § 205.9 and shall be filed with the Office of Hearings and Appeals in accordance with § 205.4. Unless otherwise specified, any participant may file a response to a motion within five days of service.

(2) All documents shall be filed in duplicate, unless they contain confidential information, in which case they must be filed in triplicate.

(3) If a person claims that any portion of a document which he is filing contains confidential information, such information should be deleted from two of the three copies which are filed. One copy from which confidential information has been deleted will be placed in the Office of Hearings and Appeals Public Docket Room.

(b)(1) Persons other than DOE offices shall on the date a submission is filed serve each person on the official service list. Service shall be made in accordance with § 205.7 and may also be made by deposit in the regular United States mail, properly stamped and addressed, when accompanied by proof of service consisting of a certifi-

cate of counsel or an affidavit of the person making the service. If any filing arguably contains confidential information, a person may serve copies with the confidential information deleted upon all persons on the official service list except DOE offices, which shall be served both an original filing and one with deletions.

(2) A DOE office shall on the date it files a submission serve all persons on the official service list, unless the filing arguably contains confidential information. In that case the DOE office shall notify the person to whom the information relates of the opportunity to identify and delete the confidential information. The DOE Office may delay the service of a submission containing arguably confidential information upon all persons other than the possessor of the confidential information and other DOE offices up to 14 days. The possessor of the confidential information shall serve the filing with any deletions upon all persons on the official service list within such time period.

(c) Any filing made under this section shall include a certification of compliance by the filer with the provisions of this subpart. The person serving a document shall file a certificate of service, which includes the date and manner of service for each person on the official service list.

§ 205.196 Statement of objections.

(a) A person who has filed a Notice of Objection shall file a Statement of Objections to a Proposed Remedial Order within 40 days after service of the Notice of Objection. A request for an extension of time for filing must be submitted in writing and may be granted for good cause shown.

(b) The Statement of Objections shall set forth the bases for the objections to the issuance of the Proposed Remedial Order as a final order, including a specification of the issues of fact or law which the person intends to contest in any further proceeding involving the compliance matter which is the subject of the Proposed Remedial Order. The Statement shall set forth the findings of fact contained in the Proposed Remedial Order which are alleged to be erroneous,

the factual basis for such allegations, and any alternative findings which are sought. The Statement shall include a discussion of all relevant authorities which support the position asserted. The Statement may include additional factual representations which are not referred to in the Proposed Remedial Order and which the person contends are material and relevant to the compliance proceeding. For each additional factual representation which the person asserts should be made, the Statement shall include reasons why the factual representation is relevant and material, and the manner in which its validity is or will be established. The person shall also specify the manner in which each additional issue of fact was raised in any prior administrative proceeding which led to issuance of the Proposed Remedial Order, or the reasons why it was not raised.

(c) A Statement of Objections that is filed by the person to whom a Proposed Remedial Order is directed shall include a copy of any relevant Notice of Probable Violation, each Response thereto, the Proposed Remedial Order, and any relevant work papers or supplemental information previously provided by ERA. Copies of this material must also be included with the copy of the Statement of Objections served upon the DOE Assistant General Counsel for Administrative Litigation. All other persons on the official service list must be notified that such materials are available from the notifier upon written request.

§ 205.197 Response to statement of objections; reply.

(a) Within 30 days after service of a Statement of Objections each participant may file a Response. If any motions are served with the Statement of Objections, a participant shall have 30 days from the date of service to respond to such submissions, notwithstanding any shorter time periods otherwise required in this Subpart. The Response shall contain a full discussion of the position asserted and a discussion of the legal and factual bases which support that position. The Response may also contain a request that

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any issue of fact or law advanced in a Statement of Objections be dismissed. Any such request shall be accompanied by a full discussion of the reasons supporting the dismissal.

(b) A participant may submit a Reply to any Response within 10 days after the date of service of the Response.

§ 205.198 Discovery.

(a) If a person intends to file a Motion for Discovery, he must file it at the same time that he files his Statement of Objections or at the same time he files his Response to a Statement of Objections, whichever is earlier. All Motions for Discovery and related filings must be served upon the person to whom the discovery is directed. If the person to whom the discovery is directed is not on the official service list, the documents served upon him shall include a copy of this section, the address of the Office of Hearings and Appeals and a statement that objections to the Motion may be filed with the Office of Hearings and Appeals.

(b) A Motion for Discovery may request that:

(1) A person produce for inspection and photocopying non-privileged written material in his possession;

(2) A person respond to written interrogatories;

(3) A person admit to the genuineness of any relevant document or the truth of any relevant fact; or

(4) The deposition of a material witness be taken.

(c) A Motion for Discovery shall set forth the reasons why the particular discovery is necessary in order to obtain relevant and material evidence and shall explain why such discovery would not unduly delay the proceeding.

(d) Within 20 days after a Motion for Discovery is served, a participant or a person to whom the discovery is directed may file a request that the Motion be denied in whole or in part, stating the reasons which support the request.

(e) Discovery may be conducted only pursuant to an Order issued by the Office of Hearings and Appeals. A Motion for Discovery will be granted if

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it is concluded that discovery is necessary for the party to obtain relevant and material evidence and that discovery will not unduly delay the proceeding. Depositions will be permitted if a convincing showing is made that the participant cannot obtain the material sought through one of the other discovery means specified in paragraph (b) of this section.

(f) The Director of the Office of Hearings and Appeals or his designee may issue subpoenas in accordance with § 205.8 in support of Discovery Orders, except that § 205.8 (h)(2), (3), and (4) shall not apply to such subpoenas.

(g) The Office of Hearings and Appeals may order that any direct expenses incurred by a person to produce evidence pursuant to a Motion for Discovery be charged to the person who filed the Motion.

(h)(1) If a person fails to comply with an order relating to discovery, the Office of Hearings and Appeals may order appropriate sanctions.

(2) It shall be the duty of aggrieved participants to request that appropriate relief be fashioned in such situations.

(i) Any order issued by the Office of Hearings and Appeals with respect to discovery shall be subject to further administrative review or appeal only upon issuance of the determination referred to in § 205.199B.

§ 205.198A Protective order.

A participant who has unsuccessfully attempted in writing to obtain information that another participant claims is confidential may file a Motion for Discovery and Protective Order. This motion shall meet the requirements of § 205.198 and shall specify the particular confidential information that the movant seeks and the reasons why the information is necessary to adequately present the movant's position in the proceeding. A copy of the written request for information, a certification concerning when and to whom it was served and a copy of the response, if any, shall be appended to the motion. The motion must give the possessor of the information notice that a Response to the

Motion must be filed within ten days. The Response shall specify the safeguards, if any, that should be imposed if the information is ordered to be released. The Office of Hearings and Appeals may issue a Protective Order upon consideration of the Motion and the Response.

§ 205.199 Evidentiary hearing.

(a) *Filing Requirements.* At the time a person files a Statement of Objections he may also file a motion requesting an evidentiary hearing be convened. A motion requesting an evidentiary hearing may be filed by any other participant within 30 days after that participant is served with a Statement of Objections.

(b) *Contents of Motion for Evidentiary Hearing.* A Motion for Evidentiary Hearing shall specify each disputed issue of fact and the bases for the alternative findings the movant asserts. The movant shall also describe the manner in which each disputed issue of fact was raised in any prior administrative proceeding which led to issuance of the Proposed Remedial Order, or why it was not raised. The movant shall with respect to each disputed or alternative finding of fact:

(1) As specifically as possible, identify the witnesses whose testimony is required;

(2) State the reasons why the testimony of the witnesses is necessary; and

(3) State the reasons why the asserted position can be effectively established only through the direct questioning of witnesses at an evidentiary hearing.

(c) *Response to Motion for Evidentiary Hearing.* Within 20 days after service of any Motion for Evidentiary Hearing, the Office that issued the Proposed Remedial Order shall, and any other participant may file a Response with the Office of Hearings and Appeals. The Response shall specify:

(1) Each particular factual representation which is accepted as correct for purposes of the proceeding;

(2) Each particular factual representation which is denied;

(3) Each particular factual representation which the participant is not in a position to accept or deny;

(4) Each particular factual representation which is not accepted and the participant wishes proven by the submission of evidence;

(5) Each particular factual representation which the participant is prepared to dispute through the testimony of witnesses or the submission of verified documents; and

(6) Each particular factual representation which the participant asserts should be dismissed as immaterial or irrelevant.

(d) *Prehearing Conferences.* After all submissions with respect to a Motion for Evidentiary Hearing are filed, the Office of Hearings and Appeals may conduct conferences or hearings to resolve differences of view among the participants.

(e) *Decision on Motion for Evidentiary Hearing.* After considering all relevant information received in connection with the Motion, the Office of Hearings and Appeals shall enter an Order. In the Order the Office of Hearings and Appeals shall direct that an evidentiary hearing be convened if it concludes that a genuine dispute exists as to relevant and material issues of fact and an evidentiary hearing would substantially assist it in making findings of fact in an effective manner. If the Motion for Evidentiary Hearing is granted in whole or in part, the Order shall specify the parties to the hearing, any limitations on the participation of a party, and the issues of fact set forth for the evidentiary hearing. The Order may also require parties that have adopted similar positions to consolidate their presentations and to appear at the evidentiary hearing through a common representative. If the Motion is denied, the Order may allow the movant to file affidavits and other documents in support of his asserted findings of fact.

(f) *Review of Decision.* The Order of the Office of Hearings and Appeals with respect to a Motion for Evidentiary Hearing shall be subject to further administrative review or appeal only upon issuance of the determination referred to in § 205.199B.

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(g) *Conduct of Evidentiary Hearing.* All evidentiary hearings convened pursuant to this section shall be conducted by the Director of the Office of Hearings and Appeals or his designee. At any evidentiary hearing the parties shall have the opportunity to present material evidence which directly relates to a particular issue of fact set forth for hearing. The presiding officer shall afford the parties an opportunity to cross examine all witnesses. The presiding officer may administer oaths and affirmations, rule on objections to the presentation of evidence, receive relevant material, rule on any motion to conform to the Proposed Remedial Order to the evidence presented, rule on motions for continuance, dispose of procedural requests, determine the format of the hearing, modify any order granting a Motion for Evidentiary Hearing, direct that written motions or briefs be provided with respect to issues raised during the course of the hearing, issue subpoenas, and otherwise regulate the conduct of the hearing. The presiding officer may take reasonable measures to exclude duplicative material from the hearing, and may place appropriate limitations on the number of witnesses that may be called by a party. The presiding officer may also require that evidence be submitted through affidavits or other documents if the direct testimony of witnesses will unduly delay the orderly progress of the hearing and would not contribute to resolving the issues involved in the hearing. The provisions of § 205.8 which relate to subpoenas and witness fees shall apply to any evidentiary hearing, except that subsection § 205.8(h) (2), (3), and (4) shall not apply.

§ 205.199A Hearing for the purpose of oral argument only.

(a) A participant is entitled upon timely request to a hearing to present oral argument with respect to the Proposed Remedial Order, whether or not an evidentiary hearing is requested or convened. A participant's request shall normally be considered untimely, if made more than 10 days after service of a determination regarding any motion filed by the requestor or, if no

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motions were filed by him, if made after the date for filing his Reply or his Response to a Statement of Objections.

(b) If an evidentiary hearing is convened, and a hearing for oral argument is requested, the Office of Hearings and Appeals shall determine whether the hearing for oral argument shall be held in conjunction with the evidentiary hearing or at a separate time.

(c) A hearing for the purpose of receiving oral argument will generally be conducted only after the issues involved in the proceeding have been delineated, and any written material which the Office of Hearings and Appeals has requested to supplement a Statement of Objections or Responses has been submitted. The presiding officer may require further written submissions in support of any position advanced or issued at the hearing, and shall allow responses any such submissions.

§ 205.199B Remedial order.

(a) After considering all information received during the proceeding, the Director of the Office of Hearings and Appeals or his designee may issue a final Remedial Order. The Remedial Order may adopt the findings and conclusions contained in the Proposed Remedial Order or may modify or rescind any such finding or conclusion to conform the Order to the evidence or on the basis of a determination that the finding or conclusion is erroneous in fact or law or is arbitrary or capricious. In the alternative, the Office of Hearings and Appeals may determine that no Remedial Order should be issued or may remand all or a portion of the Proposed Remedial Order to the issuing DOE office for further consideration or modification. Every determination made pursuant to this section shall state the relevant facts and legal bases supporting the determination.

(b) The DOE shall serve a copy of any determination issued pursuant to paragraph (a) of this section upon the person to whom it is directed, any person who was served with a copy of the Proposed Remedial Order, the

DOE office that issued the Proposed Remedial Order, the DOE Assistant General Counsel for Administrative Litigation and any other person on the official service list. Appropriate deletions may be made in the determinations to ensure that confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552. A copy of the determination with appropriate deletions to protect confidential and proprietary data shall be placed in the Office of Hearings and Appeals Public Docket Room.

§ 205.199C Appeals of remedial order to FERC.

(a) The person to whom a Remedial Order is issued by the Office of Hearings and Appeals may file an administrative appeal if the Remedial Order proceeding was initiated by a Notice of Probable Violation issued after October 1, 1977, or, in those situations in which no Notice of Probable Violation was issued, if the proceeding was initiated by a Proposed Remedial Order issued after October 1, 1977.

(b) Any such appeal must be initiated within 30 days after service of the Order by giving written notice to the Office of Hearings and Appeals that the person to whom a Remedial Order is issued wishes to contest the Order.

(c) The Office of Hearings and Appeals shall promptly advise the Federal Energy Regulatory Commission of its receipt of a notice described in paragraph (b) of this section.

(d) The Office of Hearings and Appeals may, on a case by case basis, set reasonable time limits for the Federal Energy Regulatory Commission to complete its action on such an appeal proceeding.

(e) In order to exhaust administrative remedies, a person who is entitled to appeal a Remedial Order issued by the Office of Hearings and Appeals must file a timely appeal and await a decision on the merits. Any Remedial Order that is not appealed within the 30-day period shall become effective as a final Order of the DOE and is not subject to review by any court.

§ 205.199D Interim remedial order for immediate compliance.

(a) Notwithstanding the provisions of §§ 205.191 through 205.199C, the DOE may issue an Interim Remedial Order for Immediate Compliance, which shall be effective upon issuance and until rescinded or suspended, if it finds:

(1) There is a strong probability that a violation has occurred, is continuing or is about to occur;

(2) Irreparable harm will occur unless the violation is remedied immediately; and

(3) The public interest requires the avoidance of such irreparable harm through immediate compliance and waiver of the procedures afforded under §§ 205.191 through 205.199C.

(b) An Interim Remedial Order for Immediate Compliance shall be served promptly upon the person against whom such Order is issued by personal service, telex or telegram, with a copy served by registered or certified mail. The copy shall contain a written statement of the relevant facts and the legal basis for the Remedial Order for Immediate Compliance, including the findings required by paragraph (a) of this section.

(c) The DOE may rescind or suspend an Interim Remedial Order for Immediate Compliance if it appears that the criteria set forth in paragraph (a) of this section are no longer satisfied. When appropriate, however, such a suspension or rescission may be accompanied by a Notice of Probable Violation or Proposed Remedial Order issued under § 205.191 or § 205.192.

(d) If at any time in the course of a proceeding commenced by a Notice of Probable Violation or Proposed Remedial Order the criteria set forth in paragraph (a) of the section are satisfied, the DOE may issue an Interim Remedial Order for Immediate Compliance, even if the 30-day period for submitting a reply to that document has not expired.

(e) Any person who is aggrieved by an Interim Remedial Order for Immediate Compliance may contest the basis for the Order within 10 days after the issuance of the Interim Order by filing a Notice of Objection

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which meets the requirements of § 205.193. The person objecting to the issuance of the Interim Remedial Order for Immediate Compliance shall follow the procedures specified in §§ 205.192A through 205.199C to establish that the Interim Order is erroneous in fact or law or is arbitrary or capricious.

(f) Any aggrieved person who fails to file a timely Notice of Objection to the issuance of an Interim Remedial Order may no longer object to issuance of the Interim Order in final form. Under those circumstances, the Interim Order shall promptly be issued as a final Order of the DOE.

(g) After considering all information received during a proceeding convened pursuant to a Notice of Objection described in paragraph (e) of this section, the Director of the Office of Hearings and Appeals or his designee shall determine whether the Interim Order should be made permanent, should be modified, or should be rescinded. The general procedures in §§ 205.192 through 205.199C shall apply to any such determination.

(h)(1) Any person aggrieved by an Interim Order for Immediate Compliance may file an Application for Temporary Stay or an Application for Stay of that Order with the Office of Hearings and Appeals. The Office of Hearings and Appeals shall decide an Application for Temporary Stay within two working days after receipt and an Application for Stay within 10 working days after receipt of the application.

(2) A person whose application for a Stay of an Interim Remedial Order is denied may appeal that denial to the Federal Energy Regulatory Commission. The Office of Hearings and Appeals may, on a case by case basis, set reasonable time limits for the Commission to complete action on any such appeal.

(3) After reaching a decision on an appeal involving an Application for Stay, the Federal Energy Regulatory Commission shall refer the matter back to the Office of Hearings and Appeals for proceedings on the merits of the Interim Remedial Order pursuant to paragraphs (e) through (g) of this section.

(1)(1) An administrative appeal to the Federal Energy Regulatory Commission from a Remedial Order for Immediate Compliance issued pursuant to paragraph (g) or this section must be filed within 30 days after service of the Order.

(2) A person who wishes to contest a Remedial Order for Immediate Compliance shall notify the Office of Hearings and Appeals within 30 days after service of the Order that he wishes to contest the Order, and the procedures of § 205.199C (c) and (d) shall apply to the appeal.

(3) In order to exhaust administrative remedies, a person must file an Appeal pursuant to the procedures set forth in this section and await an Order granting or denying the Appeal.

§ 205.199E Notice of proposed disallowance, proposed order of disallowance, and order of disallowance.

(a) The ERA shall begin a proceeding under this section by issuing a Notice of Proposed Disallowance pursuant to the provisions of Parts 205 and 212 of this chapter.

(b) Within 30 days after service, the person upon whom the Notice of Proposed Disallowance is served may file a reply with the ERA office that issued the Notice. The ERA may extend the 30-day period for good cause shown.

(c) The reply shall set forth all relevant facts and law pertaining to the matter that is the subject of the Notice and be signed by the person filing it. In further proceedings regarding this act or transaction, the Office of Hearings and Appeals will decline to consider an issue that was not raised in the reply to the Notice of Probable Disallowance unless good cause is shown for the failure to raise the issue.

(d) The reply shall include a discussion of all relevant authorities which support the position asserted, including rulings, regulations, interpretations, and previous decisions issued by DOE or its predecessor agencies.

(e) A request for a conference regarding the Notice should be included in the reply.

(f) If a reply has not been filed with the ERA within the 30-day or extended period provided, the recipient shall be deemed to admit the accuracy of the factual allegations and legal conclusions stated in the Notice of Proposed Disallowance, and the Notice shall become a Proposed Order of Disallowance.

(g) After consideration of any timely reply filed, the ERA may adopt, modify, or rescind the Notice of Proposed Disallowance and issue a Proposed Order of Disallowance. The Proposed Order shall set forth the relevant facts and legal bases for the conclusions reached therein.

(h) The procedures specified in §§ 205.192 through 205.199C shall be applicable to Proposed Orders of Disallowance, and shall govern the issuance of Orders of Disallowance and Appeals from Orders of Disallowance.

(i) An Order of Disallowance shall be effective upon issuance.

§ 205.199F Ex parte communications.

(a) No person who is not employed or otherwise supervised by the Office of Hearings and Appeals shall submit ex parte communications to the Director or any person employed or otherwise supervised by the Office with respect to any matter involved in Remedial Order or Order of Disallowance proceedings.

(1) Ex parte communications include any ex parte oral or written communications relative to the merits of a Proposed Remedial Order, Interim Remedial Order for Immediate Compliance, or Proposed Order of Disallowance proceeding pending before the Office of Hearings and Appeals. The term shall not, however, include requests for status reports, inquiries as to procedures, or the submission of proprietary or confidential information. Notice that proprietary or confidential submissions have been made shall be given to all persons on the official service list.

(b) If any communication occurs that violates the provisions of this section, the Office of Hearings and Appeals shall promptly make the substance of the communication available to the public and serve a copy of a written communication or a memoran-

dum summarizing an oral communication to all participants in the affected proceeding. The Office of Hearings and Appeals may also take any other appropriate action to mitigate the adverse impact to any person whose interest may be affected by the ex parte contact.

§ 205.199G Extension of Time; Interim and Ancillary Orders.

The Director of the Office of Hearings and Appeals or his designee may permit upon motion any document or submission referred to in this subpart other than appeals to FERC to be amended or withdrawn after it has been filed or to be filed within a time period different from that specified in this subpart. The Director or his designee may upon motion or on his own initiative issue any interim or ancillary Orders, reconsider any determinations, or make any rulings or determinations that are deemed necessary to ensure that the proceedings specified in this Subpart are conducted in an appropriate manner and are not unduly delayed.

§ 205.199H Actions not subject to administrative appeal.

A Notice of Probable Violation, Notice of Proposed Disallowance, Proposed Remedial Order or Interim Remedial Order for Immediate Compliance issued pursuant to this subpart shall not be an action from which there may be an administrative appeal pursuant to Subpart H. In addition, a determination by the Office of Hearings and Appeals that a Remedial Order, an Order of Disallowance, or a Remedial Order for Immediate Compliance should not be issued shall not be appealable pursuant to Subpart H.

§ 205.199I Remedies.

(a) A Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance, or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE Regulations, to make appropriate compensation to third persons for adminis-

trative expenses of effectuating appropriate remedies, and to take such other action as the DOE determines is necessary to eliminate or to compensate for the effects of a violation or any cost disallowance pursuant to § 212.83 or § 212.84. Such action may include a direction to the person to whom the Order is issued to establish an escrow account or take other measures to make refunds directly to purchasers of the products involved, notwithstanding the fact that those purchasers obtained such products from an intermediate distributor of such person's products, and may require as part of the remedy that the person to whom the Order is issued maintain his prices at certain designated levels, notwithstanding the presence or absence of other regulatory controls on such person's prices. In cases where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers.

(b) The DOE may, when appropriate, issue final Orders ancillary to a Remedial Order, Remedial Order for Immediate Compliance, Order of Disallowance, or Consent Order requiring that a direct or indirect recipient of a refund pass through, by such means as the DOE deems appropriate, including those described in paragraph (a) of this section, all or a portion of the refund, on a pro rata basis, to those customers of the recipient who were adversely affected by the initial overcharge. Ancillary Orders may be appealed to the Office of Hearings and Appeals only pursuant to Subpart H.

§ 205.199J Consent order.

(a) Notwithstanding any other provision of this subpart, the DOE may at any time resolve an outstanding compliance investigation or proceeding, or a proceeding involving the disallowance of costs pursuant to § 205.199E with a Consent Order. A Consent Order must be signed by the person to whom it is issued, or a duly authorized representative, and must indicate agreement to the terms contained

therein. A Consent Order need not constitute an admission by any person that DOE regulations have been violated, nor need it constitute a finding by the DOE that such person has violated DOE regulations. A Consent Order shall, however, set forth the relevant facts which form the basis for the Order.

(b) A Consent Order is a final Order of the DOE having the same force and effect as a Remedial Order issued pursuant to § 205.199B or an Order of Disallowance issued pursuant to § 205.199E, and may require one or more of the remedies authorized by § 205.199I and § 212.84(d)(3). A Consent Order becomes effective no sooner than 30 days after publication under paragraph (c) of this section, unless (1) the DOE makes a Consent Order effective immediately, because it expressly deems it necessary in the public interest, or (2) the Consent Order involves a sum of less than \$500,000 in the aggregate, excluding penalties and interest, in which case it will be effective when signed both by the person to whom it is issued and the DOE, and will not be subject to the provisions of paragraph (c) of this section unless the DOE determines otherwise. A Consent Order shall not be appealable pursuant to the provisions of § 205.199C or § 205.199D and Subpart H, and shall contain an express waiver of such appeal or judicial review rights as might otherwise attach to a final Order of the DOE.

(c) When a Consent Order has been signed, both by the person to whom it is issued and the DOE, the DOE will publish notice of such Consent Order in the FEDERAL REGISTER and in a press release to be issued simultaneously therewith. The FEDERAL REGISTER notice and the press release will state at a minimum the name of the company concerned, a brief summary of the Consent Order and other facts or allegations relevant thereto, the address and telephone number of the DOE office at which copies of the Consent Order will be available free of charge, the address to which comments on the Consent Order will be received by the DOE, and the date by which such comments should be submitted, which date will not be less than 30 days after

publication of the FEDERAL REGISTER notice. After the expiration of the comment period the DOE may withdraw its agreement to the Consent Order, attempt to negotiate a modification of the Consent Order, or issue the Consent Order as signed. The DOE will publish in the FEDERAL REGISTER, and by press release, notice of any action taken on a Consent Order and such explanation of the action taken as deemed appropriate. The provisions of this paragraph shall be applicable notwithstanding the fact that a Consent Order may have been made immediately effective pursuant to paragraph (b) of this section (except in cases where the Consent Order involves sums of less than \$500,000 in the aggregate, excluding penalties and interest).

(d) At any time and in accordance with the procedures of Subpart J, a Consent Order may be modified or rescinded, upon petition by the person to whom the Consent Order was issued, and may be rescinded by the DOE upon discovery of new evidence which is materially inconsistent with evidence upon which the DOE's acceptance of the Consent Order was based. Modifications of a Consent Order which is subject to public comment under the provisions of paragraph (c) of this section, which in the opinion of the DOE significantly change the terms or the impact of the original Order, shall be republished under the provisions of that paragraph.

(e) Notwithstanding the issuance of a Consent Order, the DOE may seek civil or criminal penalties or compromise civil penalties pursuant to Subpart P concerning matters encompassed by the Consent Order, unless the Consent Order by its terms expressly precludes the DOE from so doing.

(f) If at any time after a Consent Order becomes effective it appears to the DOE that the terms of the Consent Order have been violated, the DOE may refer such violations to the Department of Justice for appropriate action in accordance with Subpart P.

Subpart P—Investigations, Violations, Sanctions, and Judicial Actions

§ 205.200 Purpose and scope.

This subpart establishes the procedures relating to investigations, violations, sanctions, and judicial actions under this chapter, except that the provisions of this subpart shall not apply with respect to sanctions under Part 209, and with respect to investigations, violations, sanctions, and judicial actions under Part 213.

[41 FR 36647, Aug. 31, 1976]

§ 205.201 Investigations.

(a) The DOE may initiate and conduct investigations relating to the scope, nature and extent of compliance by any person with the rules, regulations or statutes of the DOE or any order, court decree or agency action relating thereto.

(b) Any duly designated and authorized representative of DOE has the authority to conduct an investigation and to take such action as he deems necessary and appropriate to the conduct of the investigation including any action pursuant to § 205.8.

(c) There are no parties, as that term is used in adjudicative proceedings, in an investigation under this subpart, and no person may intervene or participate as a matter of right in any investigation under this subpart.

(d) Any person may request the DOE to initiate an investigation pursuant to paragraph (a) of this section. A request for an investigation shall set forth the subject matter to be investigated as fully as possible and include supporting documentation and information. No particular forms or procedures are required.

(e) Any person who is requested to furnish documentary evidence or testimony in an investigation, upon written request, shall be informed of the general purpose of the investigation.

(f) DOE shall not disclose information or documents that are obtained during any investigation unless (1) DOE directs or authorizes the public disclosure of the investigation; (2) the information or documents are a matter of public record; or (3) disclo-

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sure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and 10 CFR Part 1004. A request for confidential treatment of information for purposes of the Freedom of Information Act shall not prevent disclosure by DOE if disclosure is determined to be in the public interest and otherwise permitted by law.

(g) During the course of an investigation any person may submit at any time any document, statement of facts or memorandum of law for the purpose of explaining the person's position or furnish evidence which the person considers relevant to a matter under investigation.

(h) If facts disclosed by an investigation indicate that further action is unnecessary or unwarranted, the investigative file may be closed without prejudice to further investigation by the DOE at any time that circumstances so warrant.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, as amended; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

[44 FR 23202, Apr. 19, 1979]

§ 205.202 Violations.

Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this chapter or any order issued pursuant thereto is a violation of the DOE regulations stated in this chapter.

[39 FR 35489, Oct. 1, 1974. Redesignated at 41 FR 36647, Aug. 31, 1976]

§ 205.203 Sanctions.

(a) *General.* Any person who violates any provision of this chapter or any order issued pursuant thereto shall be subject to penalties and sanctions as provided herein.

(1) The provisions herein for penalties and sanctions shall be deemed cumulative and not mutually exclusive.

(2) Each day that a violation of the provisions of this chapter or any order issued pursuant thereto continues shall be deemed to constitute a separate violation within the meaning of the provisions of this chapter relating to criminal fines and civil penalties.

(b) *Civil penalties.* (1) Any person who violates any provision of the regulation issued under authority of the Emergency Petroleum Allocation Act of 1973, as amended, or any order issued pursuant thereto shall be subject to a civil penalty:

(i) With respect to activities relating to the production, distribution or refining of crude oil, of not more than \$20,000 for each violation;

(ii) With respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than activities entirely at the retail level), of not more than \$10,000 for each violation; and

(iii) With respect to activities relating to the distribution of residual fuel oil or any refined petroleum product at the retail level or with respect to activities not otherwise referred to in paragraphs (b)(1) (i) and (ii) of this section of not more than \$2,500 for each violation.

(2) The DOE may at any time refer a violation to the Department of Justice for the commencement of an action for civil penalties. When the DOE considers it to be appropriate or advisable, it may compromise, settle and collect civil penalties.

(c) *Criminal penalties.* (1) Any person who willfully violates any provision of the regulation issued under authority of the Emergency Petroleum Allocation Act of 1973, as amended, or any order issued pursuant thereto may be imprisoned not more than 1 year, or shall be fined:

(i) With respect to activities relating to the production, distribution or refining of crude oil, not more than \$40,000 for each violation;

(ii) With respect to activities relating to the distribution of residual fuel oil or any refined petroleum product (other than at the retail level), not more than \$20,000 for each violation;

(iii) With respect to activities relating to the distribution of residual fuel oil or any refined petroleum product

at the retail level or with respect to activities not otherwise referred to in paragraphs (c)(1) (i) and (ii) of this section, not more than \$10,000 for each violation; or both.

(2) The DOE may at any time refer a willful violation to the Department of Justice for criminal prosecution.

(d) *Definitions.* For purposes of paragraphs (b) and (c) of this section:

(1) Violations with respect to "activities relating to the production, distribution or refining of crude oil" shall mean any violation by a producer or distributor of crude oil of any provision of Parts 210, 211 or 212 of Title 10, CFR, or any order issued thereunder, relating to the purchase or sale of such crude oil and any reporting requirements related thereto, or any violation by a refiner of any provision of: (i) Parts 210 or 212 of this Title, or any order issued thereunder, relating to the proper calculation, allocation or reporting of crude oil or other input costs, including both product and non-product costs, or relating to prices charged or paid for crude oil; or (ii) Part 211 of this Title, or any order issued thereunder, relating to the allocation of crude oil, including but not limited to all provisions of Subpart C of Part 211 and any reporting requirements related thereto.

(2) "Distribution at the retail level" shall mean sales to the ultimate consumers of residual fuel oil or refined petroleum products.

(e) *Corporate personnel.* (1) Any individual director, officer or agent of a corporation who knowingly and willfully authorizes, orders or performs any of the acts or practices constituting in whole or in part a violation of any provision of the regulations issued under authority of the Emergency Petroleum Allocation Act of 1973, as amended, or any order issued pursuant thereto, shall be subject to the penalties specified in paragraphs (b) and (c) of this section without regard to any penalties to which that corporation may be subject under paragraphs (b) and (c) of this section, except that no such individual director, officer or agent shall be subject to imprisonment under paragraph (c) of this section unless he also has knowledge, or reasonably should have known, of notice

of noncompliance received by the corporation from the DOE.

(2) For purposes of this paragraph (e):

(i) "Agent" shall include any employee or other person acting on behalf of the corporation on either a temporary or permanent basis, whether or not he has authority to engage in the particular activity involved; and

(ii) "Notice of Noncompliance" shall be a Remedial Order issued under §§ 205.192 or 205.193, and a Consent Order issued under § 205.197.

(f) *Other penalties.* Willful concealment of material facts, or false or fictitious or fraudulent statements or representations, or willful use of any false writing or document containing false, fictitious or fraudulent statements pertaining to matters within the scope of the EPAA or FEAA by any person shall subject such person to the criminal penalties provided in 18 U.S.C. 1001 (1970).

[39 FR 35489, Oct. 1, 1974, as amended at 41 FR 19931, May 14, 1976. Redesignated at 41 FR 36647, Aug. 31, 1976, and amended at 41 FR 49627, Nov. 10, 1976]

§ 205.204 Injunctions.

Whenever it appears to the Administrator of the DOE, or his delegates, that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any regulation or order issued under this chapter, the Administrator, or his delegate, may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices and, upon a proper showing, a temporary restraining order or a preliminary restraining order or a preliminary or permanent injunction shall be granted without bond. The relief sought may include a mandatory injunction commanding any person to comply with any such order or regulation, or the return of money received in violation of any such order or regulation.

[39 FR 35489, Oct. 1, 1974. Redesignated at 41 FR 36647, Aug. 31, 1976]

Subpart Q—[Reserved]

**Subpart R—Office of Private
Grievances and Redress**

§ 205.230 Purpose and scope.

(a) This subpart establishes the procedures for the DOE Office of Private Grievances and Redress.

(b) The Office shall receive and consider petitions that seek special redress, relief or other extraordinary assistance apart from or in addition to the other proceedings described in this part. Such petitions shall include those seeking special assistance based on an assertion that the DOE or a State Office is not complying with the FEAA, EPAA, DOE regulations, orders or rulings, or otherwise.

(c) The Office also shall receive applications for exemption filed in accordance with Subpart E of this part. Such applications shall be processed by the Office in accordance with that subpart. Therefore the procedures provided in this subpart shall only be applicable to "Petitions for Special Redress or Other Relief."

§ 205.231 Who may file.

Any person aggrieved by the regulations contained in 10 CFR Chapter II may file a petition under this subpart.

§ 205.232 What to file.

The person aggrieved shall file a "Petition for Special Redress or Other Relief," which shall be clearly labeled as such both on the petition and on the outside of the envelope in which it is transmitted, and shall be in writing and signed by the person filing it. The petition shall comply with the general filing requirements stated in § 205.9 in addition to the requirements stated in this subpart.

§ 205.233 Where to file.

A petition shall be filed with the DOE Office of Private Grievances and Redress at the address provided in § 205.12.

§ 205.234 Notice.

(a) The person filing the petition, except a petition that asserts that the DOE or a State Office is not comply-

ing with the FEAA, EPAA, DOE regulations, orders or rulings or otherwise, shall send by United States mail a copy of the petition and any subsequent amendments or other documents relating to the petition, or a copy from which confidential information has been deleted in accordance with § 205.9(f), to each person who is reasonably ascertainable by the petitioner as a person who will be aggrieved by the DOE action sought. The copy of the petition shall be accompanied by a statement that the person may submit comments regarding the petition to the Office of Private Grievances and Redress within 10 days. The copy filed with the Office shall include certification to the DOE that the requirements of this paragraph have been complied with and shall include the names and addresses of each person to whom a copy of the petition was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the petitioner determines that compliance with paragraph (a) of this section would be impracticable, the petitioner shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the petition a description of the persons or class or classes of persons to whom notice was not sent.

(3) The DOE may require the petitioner to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the *FEDERAL REGISTER*.

(c) The DOE shall serve notice on any other person readily identifiable by the DOE as one who will be aggrieved by the DOE action sought that written comments regarding the petition will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the DOE regarding a petition filed under this subpart shall send a copy of the comments, or a copy from from which confidential information has been deleted in accordance with § 205.9(f), to the petitioner.

The person shall certify to the DOE that it has complied with the requirements of this paragraph. The DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 205.235 Contents.

The petition shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the petition and to the DOE action sought. Such facts shall include, but not be limited to, the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction, if applicable; a description of the acts or transactions that would be affected by the requested action; a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the petition, and an explanation of how the petitioner is aggrieved by the regulation. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the petition shall be submitted to the DOE upon its request. When the petition pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction must be submitted.

§ 205.236 DOE evaluation of request.

(a) *Processing.* (1) The DOE may initiate an investigation of any statements in a petition and utilize in its evaluation any relevant facts obtained by such investigation. The DOE may solicit and accept submissions from third persons relevant to any petition provided that the petitioner is afforded an opportunity to respond to all third person submissions. In evaluating a petition, the DOE may consider any other source of information. The DOE on its own initiative may convene a conference, if, in its discretion, it considers that such will advance its evaluation of the petition.

(2) If the DOE determines that there is insufficient information upon which to base a decision and if, upon

request, the necessary additional information is not submitted, the DOE may dismiss the petition without prejudice. If the failure to supply additional information is repeated or willful, the DOE may dismiss the petition with prejudice. If the petitioner fails to provide the notice required by § 205.234, the DOE may dismiss the petition without prejudice.

(b) *Criteria.* (1) The DOE will dismiss without prejudice a "Petition for Special Redress or Other Relief" if it determines that another more appropriate proceeding is provided by this part. Upon that determination, the Office will transmit the petition to the DOE Office responsible for such other proceeding and the petition thereafter will be processed as an application or request for such other DOE action. The petitioner shall be given a reasonable period of time to conform the petition to the procedural requirements of the other proceeding, if necessary.

(2) The DOE will dismiss with prejudice a "Petition for Special Redress or Other Relief" filed by a person who has exhausted his administrative remedies with respect to any proceeding provided by this part, as provided in Subpart H, and received a final order therefrom that deals with the same issue or transaction; and, similarly, will dismiss with prejudice such petition if filed by a person who has not exhausted his administrative remedies as provided in this part.

§ 205.237 Decision and response.

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the DOE will issue an order granting or denying the petition, except a petition regarding the DOE or a State Office. The latter petition will be considered to be advice only and no order shall be issued in response thereto.

(b) The order denying or granting the petition shall include a written statement setting forth the relevant facts and legal basis for the order. Such order shall state that it is a final order of the DOE of which the petitioner may seek judicial review.

Subparts S—T—[Reserved]

Subpart U—Procedures for Electricity Export Cases

AUTHORITY: Federal Power Act, 41 Stat. 1063, as amended; Executive Order 10485, as amended by Executive Order 12038; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended; Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: 49 FR 35315, Sept. 6, 1984, unless otherwise noted.

§ 205.260 Purpose and scope.

(a) The purpose of this section is to state the procedures that will be followed by the Economic Regulatory Administration of the Department of Energy in electricity export adjudications.

(b) *Definitions.*

As used in this subpart—

“Administrator” means the Administrator of the Economic Regulatory Administration.

“Decisional employees” means the Administrator, presiding officers at adjudicatory hearings, and other employees of the Department, including consultants and contractors, who are, or may reasonably be expected to be, involved in the decision-making process, which includes advising the Administrator in resolving the issues in an adjudication. The term does not include those employees of the Department performing investigative or trial functions in an adjudication, unless they are specifically requested by the Administrator or his delegate to participate in the decision-making process.

“Department” means the Department of Energy.

“Off-the-record communication” means an *ex parte* communication, which is an oral or written communication relevant to the merits of an adjudication and not on the record and with respect to which reasonable prior notice to all participants and opportunity to be present at, or respond to, the communication is not given, but does not include a communication relating solely to procedures which are

not relevant to the merits of the adjudication.

“Interested person” means a person outside the Department whose interest in the adjudication goes beyond the general interest of the public as a whole and includes applicants, intervenors, competitors of applicants, non-profit and public interest organizations, and other individuals and organizations, including state, local and other public officials, with a proprietary, financial or other special interest in the outcome of the adjudication. The term does not include other federal agencies, unless an agency is a participant in the adjudication.

“Participant” means any applicant or intervenor participating in the adjudication.

“Adjudication” means a formal proceeding employing procedures identical or similar to those required by the Administrative Procedure Act, as codified in 5 U.S.C. 551, 556, and 557, to consider an application to export electricity.

“Reasonable prior notice” means 7 days’ written notice stating the nature and purpose of the communication.

“Relevant to the merits” means a communication directly related to the merits of a specific adjudication but does not include general background discussions about an entire industry or communications of a general nature made in the course of developing agency policy for future general application.

§§ 205.261—205.269 [Reserved]

§ 205.270 Off-the-record communications.

(a) In any proceeding which is subject to this subpart—

(1) No interested person shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any decisional employee.

(2) No decisional employee shall make an off-the-record communication or knowingly cause an off-the-record communication to be made to any interested person.

(3) A decisional employee who receives, makes, or knowingly causes to be made an oral communication pro-

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hibited by this section shall prepare a memorandum stating the substance of the communication and any responses made to it.

(4) With 48 hours of receiving, making or knowingly causing to be made a communication prohibited by this section, a decisional employee shall deliver all written off-the-record communications and all memoranda prepared in compliance with paragraph (a)(3) of this section to the Director of the Coal and Electricity Division, ERA, who will immediately place the materials described above in the public record associated with the adjudication, available for public inspection.

(5) Upon receipt of a communication knowingly made or knowingly caused to be made by a participant in violation of this section, the Administrator or presiding officer may, to the extent consistent with the interests of justice and the applicable statutory policy, require the participant to show cause why his or her claim or interest in the adjudication should not be dismissed, denied, disregarded, or otherwise adversely affected on account of the violation.

(6) The prohibitions of this section shall apply beginning at the time an adjudication is noticed for hearing (or the person responsible for the communication acquires knowledge that it will be noticed), a protest is filed, or a petition or notice to intervene in opposition to the requested Department action is filed, whichever occurs first.

(b) The prohibition, cited at 18 CFR 1.30(f), against participation in the decision-making process by Department employees who perform investigative or trial functions in an adjudication, shall no longer be applicable to ERA.

Subpart V—Special Procedures for Distribution of Refunds

AUTHORITY: Economic Stabilization Act of 1970, Pub. L. 92-210; Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385, Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, Pub. L. 95-91, Energy Policy and

Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 8566, Feb. 9, 1979, unless otherwise noted.

§ 205.280 Purpose and scope.

This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order, a Remedial Order for Immediate Compliance, an Order of Disallowance or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive.

§ 205.281 Petition for implementation of special refund procedures.

(a) At any time after the issuance of a Remedial Order (including for purposes of this subpart a Remedial Order for Immediate Compliance and an Order of Disallowance), or a Consent Order, the Special Counsel of the Department of Energy, the ERA Office of Enforcement, or any other enforcement official of the Department of Energy may file with the Office of Hearings and Appeals a Petition for the Implementation of Special Refund Procedures.

(b) The Petition shall state that the person filing it has been unable readily either to identify the persons who are entitled to refunds to be remitted pursuant to a Remedial Order or a Consent Order or to ascertain the amounts of refunds that such persons are entitled to receive. The Petition shall request that the Office of Hearings and Appeals institute appropriate proceedings under this Subpart to distribute the funds referred to in the enforcement documents.

(c) The Petition shall contain a copy of each relevant enforcement document, shall be filed in duplicate, and shall meet the requirements of § 205.9 of this part.

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§ 205.282 Evaluation of petition by the Office of Hearings and Appeals.

(a) After considering the Petition, the Director of the Office of Hearings and Appeals or his designee shall issue a Proposed Decision and Order. The Proposed Decision and Order shall generally describe the nature of the particular refund proceeding and shall set forth the standards and procedures that the Office of Hearings and Appeals intends to apply in evaluating refund claims.

(b) The Proposed Decision and Order shall be published in the **FEDERAL REGISTER** together with a statement that any member of the public may submit written comments to the Office of Hearings and Appeals with respect to the matter. At least 30 days following publication in the **FEDERAL REGISTER** shall be provided for the submission of comments.

(c) After considering the comments submitted, the Director of the Office of Hearings and Appeals or his designee shall issue a final Decision and Order which shall govern the disposition of the refunds. The final Decision and Order shall also be published in the **FEDERAL REGISTER**.

(d) The final Decision and Order shall set forth the standards and procedures that will be used in evaluating individual Applications for Refunds and distributing the refund amount. Those standards and procedures shall be consistent with the provisions of this subpart.

(e) In establishing standards and procedures for implementing refund distributions, the Office of Hearings and Appeals shall take into account the desirability of distributing the refunds in an efficient, effective and equitable manner and resolving to the maximum extent practicable all outstanding claims. In order to do so, the standards for evaluation of individual claims may be based upon appropriate presumptions.

§ 205.283 Applications for refund.

(a) Any person entitled to a refund pursuant to a final Decision and Order issued pursuant to § 205.282 may file an Application for Refund. All Applications must be signed by the applicant and specify the DOE order to

which they pertain. Any Application for a refund in excess of \$100 must be filed in duplicate, and a copy of that Application will be available for public inspection in the DOE Public Docket Room at 2000 M Street, N.W., Washington, D.C. Any applicant who believes that his Application contains confidential information must so indicate on the first page of his Application and submit two additional copies of his Application from which the information that the applicant claims is confidential has been deleted, together with a statement specifying why any such information is privileged or confidential.

(b) The contents of an Application for Refund shall be specified in the final Decision and Order referred to in § 205.282(c). A filing deadline for Applications shall also be specified in the final Decision and Order, and shall be no less than 90 days after the publication of the Order in the **FEDERAL REGISTER**.

(c) Each Application shall be in writing and signed by the applicant, and shall indicate whether the applicant or any person acting on his instructions has filed or intends to file any other Application or claim of whatever nature regarding the matters at issue in the underlying enforcement proceeding. Each Application shall also include a sworn statement by the applicant that all information in his Application is true and correct to the best of his knowledge and belief.

§ 205.284 Processing of applications.

(a) The Director of the Office of Hearings and Appeals may appoint an administrator to evaluate Applications under guidelines established by the Office of Hearings and Appeals. The administrator, if he is not a Federal Government employee, may be compensated from the funds referred to in the Remedial Order or Consent Order. The administrator may design and distribute an optional application form for the convenience of the applicants.

(b) The Office of Hearings and Appeals or its designee may initiate an investigation of any statement made in an Application and may require verification of any document submitted

in support of a claim. In evaluating an Application, the Office of Hearings and Appeals or its designee may solicit and consider information obtained from any source and may on its own initiative convene a hearing or conference, if it determines that a hearing or conference will advance its evaluation of an Application.

(c) The Director of the Office of Hearings and Appeals or his designee shall conduct any hearing or conference convened with respect to an Application for Refund and shall specify the time and place for the hearing or conference and notify the applicant. The official conducting the hearing may administer oaths and affirmations, rule on the presentation of information, receive relevant information, dispose of procedural requests, determine the format of the hearing and otherwise regulate the course of the hearing. The provisions of § 205.8 of this part which relate to subpoenas and witness fees shall apply to any hearing convened with respect to an application for refund, except that § 205.8(h) (2), (3) and (4) shall not apply.

(d) Upon consideration of an Application and other relevant information received during the course of a refund proceeding, the Director of the Office of Hearings and Appeals or his designee shall issue an order granting or denying the Application. The order shall contain a concise statement of the relevant facts and the legal basis for the order. A copy of the order, with such modification as is necessary to ensure the confidentiality of information protected from public disclosure by 18 U.S.C. 1905, may be obtained upon request by an applicant or any other person who participated in the proceeding.

§ 205.285 Effect of failure to file a timely application.

An Application for Refund must be filed no later than the date that the Office of Hearings and Appeals establishes pursuant to § 205.283(b). Any Application that is not filed on a timely basis may be summarily dismissed. The Office of Hearings and Appeals or its designee may, however, grant extensions of time for good

cause shown. Any request for an extension of time must generally be submitted in writing prior to the deadline.

§ 205.286 Limitations on amount of refunds.

(a) The aggregate amount of all refunds approved by the Office of Hearings and Appeals or its designee in a given case shall not exceed the amount to be remitted pursuant to the relevant DOE enforcement order, plus any accumulated interest, reduced by the amount of any administrative costs approved by the Office of Hearings and Appeals. In the event that the aggregate amount of approved claims exceeds the aggregate amount of funds specified above, the Office of Hearings and Appeals may make refunds on a pro rata basis. The Office of Hearings and Appeals may delay payment of any refunds until all Applications have been processed.

(b) The Office of Hearings and Appeals may decline to consider Applications for refund amounts that, in view of the direct administrative costs involved, are too small to warrant individual consideration.

§ 205.287 Escrow accounts, segregated funds and other guarantees.

(a) In implementing the refund procedures specified in this subpart, the Director of the Office of Hearings and Appeals or his designee shall issue an order providing for the custody of the funds to be tendered pursuant to the Remedial Order or Consent Order. This Order may require placement of the funds in an appropriate interest-bearing escrow account, retention of the funds by the firm in a segregated account under such terms and conditions as are specified by the DOE, or the posting of a sufficient bond or other guarantee to ensure payment.

(b) All costs and charges approved by the Office of Hearings and Appeals and incurred in connection with the processing of Applications for Refund or incurred by an escrow agent shall be paid from the amount of funds, including any accumulated interest, to be remitted pursuant to the Remedial Order or Consent Order.

(c) After the expenses referred to in paragraph (b) of this section have been satisfied and refunds distributed to successful applicants, any remaining funds remitted pursuant to the Remedial Order or Consent Order shall be deposited in the United States Treasury or distributed in any other manner specified in the Decision and Order referred to in § 205.282(c).

(d) Funds contained in an escrow account, segregated fund, or guaranteed by other approved means shall be disbursed only upon written order of the Office of Hearings and Appeals.

§ 205.288 Interim and ancillary orders.

The Director of the Office of Hearings and Appeals or his designee may issue any interim or ancillary orders, or make any rulings or determinations to ensure that refund proceedings, including the actions of the administrator and the custodian of the funds involved in a refund proceeding, are conducted in an appropriate manner and are not unduly delayed.

Subpart W—Electric Power System Permits and Reports; Applications; Administrative Procedures and Sanctions

AUTHORITY: Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (42 U.S.C. Section 7101). Federal Power Act, Pub. L. 66-280, 41 Stat. 1063 (16 U.S.C. Section 792) *et seq.*, Department of Energy Delegation Order No. 0204-4 (42 FR 60726). E.O. 10485, 18 FR 5397, 3 CFR, 1949-1953, Comp., p. 970 as amended by E.O. 12038, 43 FR 4957, 3 CFR 1978 Comp., p. 136.

SOURCE: 45 FR 71560, Oct. 28, 1980; 46 FR 63209, Dec. 31, 1981, unless otherwise noted. (Approved by the Office of Management and Budget under Control No. 1901-0245)

APPLICATION FOR AUTHORIZATION TO TRANSMIT ELECTRIC ENERGY TO A FOREIGN COUNTRY

§ 205.300 Who shall apply.

(a) An electric utility or other entity subject to DOE jurisdiction under Part II of the Federal Power Act who proposes to transmit any electricity from the United States to a foreign country must submit an application or be a party to an application submitted

by another entity. The application shall be submitted to the Office of Utility Systems of the Economic Regulatory Administration (EPA).

(b) In connection with an application under §§ 205.300 through 205.309, attention is directed to the provisions of §§ 205.320 through 205.327, below, concerning applications for Presidential Permits for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the transmission of electric energy between the United States and a foreign country in compliance with Executive Order 10485, as amended by Executive Order 12038.

§ 205.301 Time of filing.

Each application should be made at least six months in advance of the initiation of the proposed electricity export, except when otherwise permitted by the ERA to resolve an emergency situation.

§ 205.302 Contents of application.

Every application shall contain the following information set forth in the order indicated below:

(a) The exact legal name of the applicant.

(b) The exact legal name of all partners.

(c) The name, title, post office address, and telephone number of the person to whom correspondence in regard to the application shall be addressed.

(d) The state or territory under the laws of which the applicant is organized or incorporated, or authorized to operate. If the applicant is authorized to operate in more than one state, all pertinent facts shall be included.

(e) The name and address of any known Federal, State or local government agency which may have any jurisdiction over the action to be taken in this application and a brief description of that authority.

(f) A description of the transmission facilities through which the electric energy will be delivered to the foreign country, including the name of the owners and the location of any remote facilities.

(g) A technical discussion of the proposed electricity export's reliability, fuel use and system stability impact on the applicant's present and prospective electric power supply system. Applicant must explain why the proposed electricity export will not impair the sufficiency of electric supply on its system and why the export will not impede or tend to impede the regional coordination of electric utility planning or operation.

(h) The original application shall be signed and verified under oath by an officer of the applicant having knowledge of the matters set forth therein.

§ 205.303 Required exhibits.

There shall be filed with the application and as a part thereof the following exhibits:

(a) *Exhibit A.* A copy of the agreement or proposed agreement under which the electricity is to be transmitted including a listing of the terms and conditions. If this agreement contains proprietary information that should not be released to the general public, the applicant must identify such data and include a statement explaining why proprietary treatment is appropriate.

(b) *Exhibit B.* A showing, including a signed opinion of counsel, that the proposed export of electricity is within the corporate power of the applicant, and that the applicant has complied or will comply with all pertinent Federal and State laws.

(c) *Exhibit C.* A general map showing the applicant's overall electric system and a detailed map highlighting the location of the facilities or the proposed facilities to be used for the generation and transmission of the electric energy to be exported. The detailed map shall identify the location of the proposed border crossing point(s) or power transfer point(s) by Presidential Permit number whenever possible.

(d) *Exhibit D.* If an applicant resides or has its principal office outside the United States, such applicant shall designate, by irrevocable power of attorney, an agent residing within the United States. A verified copy of such power of attorney shall be furnished with the application.

(e) *Exhibit E.* A statement of any corporate relationship or existing contract between the applicant and any other person, corporation, or foreign government, which in any way relates to the control or fixing of rates for the purchase, sale or transmission of electric energy.

(f) *Exhibit F.* An explanation of the methodology (Operating Procedures) to inform neighboring electric utilities in the United States of the available capacity and energy which may be in excess of the applicant's requirements before delivery of such capacity to the foreign purchaser. Approved firm export, diversity exchange and emergency exports are exempted from this requirement. Those materials required by this section which have been filed previously with the ERA may be incorporated by reference.

§ 205.304 Other information.

Where the application is for authority to export less than 1,000,000 kilowatt hours annually, applicants need not furnish the information called for in §§205.302(g) and 205.303 (Exhibit C). Applicants, regardless of the amount of electric energy to be exported, may be required to furnish such supplemental information as the ERA may deem pertinent.

§ 205.305 Transferability.

(a) An authorization to transmit electric energy from the United States to a foreign country granted by order of the ERA under Section 202(e) of the Federal Power Act shall not be transferable or assignable. Provided written notice is given to the ERA within 30 days, the authorization may continue in effect temporarily in the event of the involuntary transfer of this authority by operation of law (including transfers to receivers, trustees, or purchasers under foreclosure or judicial sale). This continuance is contingent on the filing of an application for permanent authorization and may be effective until a decision is made thereon.

(b) In the event of a proposed voluntary transfer of this authority to export electricity, the transferee and the transferor shall file jointly an ap-

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plication pursuant to this subsection, setting forth such information as required by §§ 205.300 through 205.304, together with a statement of reasons for the transfer.

(c) The ERA may at any time subsequent to the original order of authorization, after opportunity for hearing, issue such supplemental orders as it may find necessary or appropriate.

§ 205.306 Authorization not exclusive.

No authorization granted pursuant to Section 202(e) of the Act shall be deemed to prevent an authorization from being granted to any other person or entity to export electric energy or to prevent any other person or entity from making application for an export authorization.

§ 207.307 Form and style; number of copies

An original and two conformed copies of an application containing the information required under §§ 205.300 through 205.309 must be filed.

§ 205.308 Filing schedule and annual reports.

(a) Persons authorized to transmit electric energy from the United States shall promptly file all supplements, notices of succession in ownership or operation, notices of cancellation, and certificates of concurrence. In general, these documents should be filed at least 30 days prior to the effective date of any change.

(b) A change in the tariff arrangement does not require an amendment to the authorization. However, any entity with an authorization to export electric energy shall file with the ERA, and the appropriate state regulatory agency, a certified copy of any changed rate schedule and terms. Such changes may take effect upon the date of filing of informational data with the ERA.

(c) Persons receiving authorization to transmit electric energy from the United States shall submit to the ERA, by February 15 each year, a report covering each month of the preceding calendar year detailing the gross amount of kilowatt-hours of energy, by authorized category, re-

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ceived or delivered, and the cost and revenue associated with each category.

(Approved by the Office of Management and Budget under Control No. 1901-0245)

[45 FR 71590, Oct. 28, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 205.309 Filing procedures and fees.

Applications shall be addressed to the Office of Utility Systems of the Economic Regulatory Administration. Every application shall be accompanied by a fee of \$500.00. Fee payment shall be by check, draft, or money order payable to the Treasurer of the United States. Copies of applications and notifications of rate changes shall be furnished to the Federal Energy Regulatory Commission and all affected State public utility regulatory agencies.

APPLICATION FOR PRESIDENTIAL PERMIT AUTHORIZING THE CONSTRUCTION, CONNECTION, OPERATION, AND MAINTENANCE OF FACILITIES FOR TRANSMISSION OF ELECTRIC ENERGY AT INTERNATIONAL BOUNDARIES

§ 205.320 Who shall apply.

(a) Any person, firm, co-operative, corporation or other entity who operates an electric power transmission or distribution facility crossing the border of the United States, for the transmission of electric energy between the United States and a foreign country, shall have a Presidential Permit, in compliance with Executive Order 10485, as amended by Executive Order 12038. Such applications should be filed with the Office of Utility Systems of the Economic Regulatory Administration.

NOTE: E.O. 12038, dated February 3, 1978, amended E.O. 10485, dated September 3, 1953, to delete the words "Federal Power Commission" and "Commission" and substitute for each "Secretary of Energy." E.O. 10485 revoked and superseded E.O. 8202, dated July 13, 1939.

(b) In connection with applications hereunder, attention is directed to the provisions of §§ 205.300 to 205.309, above, concerning applications for authorization to transmit electric energy from the United States to a foreign

country pursuant to Section 202(e) of the Federal Power Act.

§ 205.321 Time of filing.

Pursuant to the DOE's responsibility under the National Environmental Policy Act, the DOE must make an environmental determination of the proposed action. If, as a result of this determination, an environmental impact statement (EIS) must be prepared, the permit processing time normally will be 18-24 months. If no environmental impact statement is required, then a six-month processing time normally would be sufficient.

§ 205.322 Contents of application.

Every application shall be accompanied by a fee prescribed in § 205.326 of this subpart and shall provide, in the order indicated, the following:

(a) *Information regarding the applicant.*

- (1) The legal name of the applicant;
- (2) The legal name of all partners;
- (3) The name, title, post office address, and telephone number of the person to whom correspondence in regard to the application shall be addressed;
- (4) Whether the applicant or its transmission lines are owned wholly or in part by a foreign government or directly or indirectly assisted by a foreign government or instrumentality thereof; or whether the applicant has any agreement pertaining to such ownership by or assistance from any foreign government or instrumentality thereof.

(5) List all existing contracts that the applicant has with any foreign government, or any foreign private concerns, relating to any purchase, sale or delivery of electric energy.

(6) A showing, including a signed opinion of counsel, that the construction, connection, operation, or maintenance of the proposed facility is within the corporate power of the applicant, and that the applicant has complied with or will comply with all pertinent Federal and State laws;

(b) *Information regarding the transmission lines to be covered by the Presidential Permit.* (1)(i) A technical description providing the following information: (A) Number of circuits, with

identification as to whether the circuit is overhead or underground; (B) the operating voltage and frequency; and (C) conductor size, type and number of conductors per phase.

(ii) If the proposed interconnection is an overhead line the following additional information must also be provided: (A) The wind and ice loading design parameters; (B) a full description and drawing of a typical supporting structure including strength specifications; (C) structure spacing with typical ruling and maximum spans; (D) conductor (phase) spacing; and (E) the designed line to ground and conductor side clearances.

(iii) If an underground or underwater interconnection is proposed, the following additional information must also be provided: (A) Burial depth; (B) type of cable and a description of any required supporting equipment, such as insulation medium pressurizing or forced cooling; and (C) cathodic protection scheme. Technical diagrams which provide clarification of any of the above items should be included.

(2) A general area map with a scale not greater than 1 inch=40 kilometers (1 inch=25 miles) showing the overall system, and a detailed map at a scale of 1 inch=8 kilometers (1 inch=5 miles) showing the physical location, longitude and latitude of the facility on the international border. The map shall indicate ownership of the facilities at or on each side of the border between the United States and the foreign country. The maps, plans, and description of the facilities shall distinguish the facilities or parts thereof already constructed from those to be constructed.

(3) Applications for the bulk power supply facility which is proposed to be operated at 138 kilovolts or higher shall contain the following bulk power system information:

(i) Data regarding the expected power transfer capability, using normal and short time emergency conductor ratings;

(ii) System power flow plots for the applicant's service area for heavy summer and light spring load periods, with and without the proposed international interconnection, for the year the line is scheduled to be placed in

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service and for the fifth year thereafter. The power flow plots submitted can be in the format customarily used by the utility, but the ERA requires a detailed legend to be included with the power flow plots;

(iii) Data on the line design features for minimizing television and/or radio interference caused by operation of the subject transmission facilities;

(iv) A description of the relay protection scheme, including equipment and proposed functional devices;

(v) After receipt of the system power flow plots, the ERA may require the applicant to furnish system stability analysis for the applicant's system.

(c) Information regarding the environmental impacts shall be provided as follows for each routing alternative:

(1) Statement of the environmental impacts of the proposed facilities including a list of each flood plain, wetland, critical wildlife habitat, navigable waterway crossing, Indian land, or historic site which may be impacted by the proposed facility with a description of proposed activities therein.

(2) A list of any known Historic Places, as specified in 36 CFR Part 800, which may be eligible for the National Register of Historic Places.

(3) Details regarding the minimum right-of-way width for construction, operation and maintenance of the transmission lines and the rationale for selecting that right-of-way width.

(4) A list of threatened or endangered wildlife or plant life which may be located in the proposed alternative.

(d) A brief description of all practical alternatives to the proposed facility and a discussion of the general environmental impacts of each alternative.

(e) The original of each application shall be signed and verified under oath by an officer of the applicant, having knowledge of the matters therein set forth.

§ 205.323 Transferability.

(a) Neither a permit issued by the ERA pursuant to Executive Order 10485, as amended, nor the facility shall be transferable or assignable. Provided written notice is given to the ERA within 30 days, the authorization may continue in effect temporarily in

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the event of the involuntary transfer of the facility by operation of law (including transfers to receivers, trustees, or purchases under foreclosure or judicial sale). This continuance is contingent on the filing of an application for a new permit and may be effective until a decision is made thereon.

(b) In the event of a proposed voluntary transfer of the facility, the permittee and the party to whom the transfer would be made shall file a joint application with the ERA pursuant to this paragraph, setting forth information as required by § 205.320 *et seq.*, together with a statement of reasons for the transfer. The application shall be accompanied by a filing fee pursuant to § 205.326.

(c) No substantial change shall be made in any facility authorized by permit or in the operation thereof unless or until such change has been approved by the ERA.

(d) Permits may be modified or revoked without notice by the President of the United States, or by the Administrator of the ERA after public notice.

§ 205.324 Form and style; number of copies.

All applicants shall file an original and two conformed copies of the application and all accompanying documents required under §§ 205.320 through 205.327.

§ 205.325 Annual report.

Persons receiving permits to construct, connect, operate or maintain electric transmission facilities at international boundaries shall submit to the ERA, by February 15 each year, a report covering each month of the preceding calendar year, detailing by category the gross amount of kilowatt-hours of energy received or delivered and the cost and revenue associated with each category.

§ 205.326 Filing procedures and fees.

Applications shall be forwarded to the Office of Utility Systems of the Economic Regulatory Administration and shall be accompanied by a filing fee of \$150. The application fee will be charged irrespective of the ERA's dis-

position of the application. Fee payment shall be by check, draft, or money order payable to the Treasurer of the United States. Copies of applications shall be furnished to the Federal Energy Regulatory Commission and all affected State public utility regulatory agencies.

§ 205.327 Other information.

The applicant may be required after filing the application to furnish such supplemental information as the ERA may deem pertinent. Such requests shall be written and a prompt response will be expected. Protest regarding the supplying of such information should be directed to the Administrator of the ERA.

§ 205.328 Environmental requirements for Presidential Permits—Alternative 1.

(a) *NEPA Compliance.* Except as provided in paragraphs (c) and (e) of this section, when an applicant seeks a Presidential Permit, such applicant will be responsible for the costs of preparing any necessary environmental document, including an Environmental Impact Statement (EIS), arising from ERA's obligation to comply with the National Environmental Policy Act of 1969 (NEPA). ERA will determine whether an environmental assessment (EA) or EIS is required within 45 days of the receipt of the Presidential Permit application and of environmental information submitted pursuant to 10 CFR 205.322 (c) and (d). ERA will use these and other sources of information as the basis for making the environmental determination:

(1) If an EIS is determined to be necessary, the applicant shall enter into a contract with an independent third party, which may be a Government-owned, contractor-operated National Laboratory, or a qualified private entity selected by ERA. The third party contractor must be qualified to conduct an environmental review and prepare an EIS, as appropriate, under the supervision of ERA, and may not have a financial or other interest in the outcome of the proceedings. The NEPA process must be completed and approved before ERA will issue a Presidential Permit.

(2) If an EA is determined to be necessary, the applicant may be permitted to prepare an environmental assessment pursuant to 10 CFR 1508.5(b) for review and adoption by ERA, or the applicant may enter into a third party contract as set forth in this section.

(b) *Environmental Review Procedure.* Except as provided in paragraphs (c) and (e) of this section, environmental documents, including the EIS, where necessary, will be prepared utilizing the process set forth above. ERA, the applicant, and the independent third party, which may be a Government-owned, contractor-operated National Laboratory or a private entity, shall enter into an agreement in which the applicant will engage and pay directly for the services of the qualified third party to prepare the necessary environmental documents. The agreement shall outline the responsibilities of each party and its relationship to the other two parties regarding the work to be done or supervised. ERA shall approve the information to be developed and supervise the gathering, analysis and presentation of the information. In addition, ERA will have the authority to approve and modify any statement, analysis, and conclusion contained in the environmental documents prepared by the third party. Before commencing preparation of the environmental document the third party will execute an ERA-prepared disclosure document stating that it does not have any conflict of interest, financial or otherwise, in the outcome of either the environmental process or the Permit application.

(c) *Financial Hardship.* Whenever ERA determines that a project is no longer economically feasible, or that a substantial financial burden would be imposed by the applicant bearing all of the costs of the NEPA studies, ERA may waive the requirement set forth in paragraphs (a) and (b) of this section and perform the necessary environmental review, completely or in part, with its own resources.

(d) *Discussions Prior to Filing.* Prior to the preparation of any Presidential Permit application and environmental report, a potential applicant is encour-

aged to contact ERA and each affected State public utility regulatory agency to discuss the scope of the proposed project and the potential for joint State and Federal environmental review.

(e) *Federal Exemption.* Upon a showing by the applicant that it is engaged in the transaction of official business of the Federal Government in filing the application pursuant to 10 CFR 205.320 *et seq.*, it will be exempt from the requirements of this section.

[48 FR 33819, July 25, 1983]

§ 205.329 Environmental requirements for Presidential Permits—Alternative 2.

(a) *NEPA Compliance.* Except as provided in paragraph (b) and (e) of this section, applicants seeking Presidential Permits will be financially responsible for the expenses of any contractor chosen by ERA to prepare any necessary environmental document arising from ERA's obligation to comply with the National Environmental Policy Act of 1969 (NEPA) in issuing such Presidential Permits:

(1) ERA will determine whether an Environmental Impact Statement (EIS) or an Environmental Assessment (EA) is required within 45 days of receipt of the Presidential Permit application and of the environmental information submitted pursuant to 10 CFR 205.322 (c) and (d). ERA will use these and other sources of information as the basis for making the environmental determination.

(2) If an EIS is determined to be necessary, ERA will notify the applicant of the fee for completing the EIS within 90 days after the submission of the application and environmental information. The fee shall be based on the expenses estimated to be incurred by DOE in contracting to prepare the EIS (i.e., the estimated fee charges to ERA by the contractor). DOE employee salaries and other fixed costs, as set forth in OMB Circular A-25, shall not be included in the applicant's fee. Fee payment shall be by check, draft, or money order payable to the Treasurer of the United States, and shall be submitted to ERA. Upon submission of fifty percent of the environmental fee, ERA will provide to the applicant a

tentative schedule for completion of the EIS.

(3) If an EA is determined to be necessary, the applicant may be permitted to prepare an environmental assessment pursuant to 40 CFR 1506.5(b) for review and adoption by ERA, or the applicant may choose to have ERA prepare the EA pursuant to the fee procedures set forth above.

(4) The NEPA process must be completed and approved before ERA will issue a Presidential Permit.

(b) *Financial Hardship.* Whenever ERA determines that a project is no longer economically feasible, or that a substantial financial burden would be imposed by the applicant bearing all of the costs of the NEPA studies, ERA may waive the requirement set forth in paragraphs (a) and (b) of this section and perform the necessary environmental review, completely or in part, with its own resources.

(c) *Discussions Prior to Filing.* Prior to the preparation of any Presidential Permit application and environmental assessment, a potential applicant is encouraged to contact ERA and each affected State public utility regulatory agency to discuss the scope of the proposed project and the potential for joint State and Federal environmental review.

(d) *Fee Payment.* The applicant shall make fee payment for completing the EIS to ERA in the following manner:

(1) 50 percent of the total amount due to be paid within 30 days of receipt of the fee information from DOE;

(2) 25 percent to be paid upon publication of the draft EIS; and

(3) 25 percent to be paid upon publication of the final EIS.

If costs are less than the amount collected, ERA will refund to the applicant the excess fee collected. If costs exceed the initial fee, ERA will fund the balance, unless the increase in costs is caused by actions or inactions of the applicant, such as the applicant's failure to submit necessary environmental information in a timely fashion. If the application is withdrawn at any stage prior to issuance of the final EIS, the fee will be adjusted to reflect the costs actually incurred;

payment shall be made by the applicant within 30 days of above referenced events.

(c) *Federal Exemption.* Upon a showing by the applicant that it is engaged in the transaction of official business of the Federal Government in filing an application pursuant to 10 CFR 205.320 *et seq.*, it will be exempt from the requirements of this section.

[48 FR 33820, July 25, 1983]

REPORT OF MAJOR ELECTRIC UTILITY SYSTEM EMERGENCIES

AUTHORITY: Department of Energy Organization Act, Pub. L. 95-91, Stat. 565 (42 U.S.C. 7101), Federal Power Act, Pub. L. 66-280 (16 U.S.C. 791 *et seq.*).

SOURCE: Sections 205.350 through 205.354 appear at 48 FR 31011, July 6, 1983, unless otherwise noted.

§ 205.350 General purpose.

The purpose of this rule is to establish a procedure for the Office of Environmental Protection, Safety, and Emergency Preparedness (EP) to maintain current information regarding the status of the electric energy supply systems in the United States so that appropriate Federal emergency response measures are implemented in a timely and effective manner. This data also may be utilized in developing legislative recommendations and other reports to the Congress.

(Approved by the Office of Management and Budget under control number 1903-0045)

§ 205.351 Reporting requirements.

For the purpose of this section, a report or a part of a report may be made jointly by two or more entities. Every electric utility or other subject entity engaged in the generation, transmission or distribution of electric energy shall report promptly to the EP Alert Coordination Officer (ACO) any events as described in paragraphs (a) through (f) of this section:

(a) The issuance of any public or private request to any customer or the general public to reduce the use of electricity for reasons of maintaining the continuity of service of the reporting entity's bulk electric power supply system. Requests to a customer(s)

served under provisions of an interruptible contract are not a reportable action unless the request is made for reasons of maintaining the continuity of service of the reporting entity's bulk electric power system. (ACO shall be notified as soon as practicable, but no later than 24 hours after the issuance of such a request.)

(b) Any intentional reduction of system voltage by 3 percent or greater for reasons of maintaining the continuity of service of the reporting entity's bulk electric power system. (ACO shall be notified as soon as practicable, but no later than 24 hours after the initiation of the action.)

(c) Any load shedding action that results in the reduction of over 100 megawatts (MW) of firm customer load for reasons of maintaining the continuity of service of the reporting entity's bulk electric power supply system. The routine use of load control equipment that reduces firm customer load is not considered to be a reportable action. (ACO shall be notified within three hours after such action is taken if practicable, or as soon thereafter as practicable.)

(d) Any electric power supply equipment or facility failure or other event that, in the judgment of the reporting entity, constitutes a hazard to the current or prospective adequacy and/or reliability of the reporting entity's bulk electric power supply system. (ACO shall be notified as soon as practicable; however reports are expected within one business day after such determination.) Examples of situations which may be reportable under this provision could be ones which:

(1) Cause the operating area to be dependent upon neighboring utilities for large quantities of unscheduled electricity deliveries to supply the operating area's loads for longer than three consecutive hours;

(2) Cause a significant increase in the use of a fuel for generating equipment such that replacement of this fuel may be a problem;

(3) Are caused by a suspected act of physical sabotage.

(e) Any outage that extends for greater than 15 minutes and affects firm loads totaling over 100 MW, or more than 50 percent of the total load

being supplied by the reporting entity's system immediately prior to the incident, whichever is less. However, utilities with a peak load in the prior year of over 3000 MW are only to report those losses of service for firm loads totaling over 200 MW for greater than 15 minutes. (ACO shall be notified as soon as practicable without unduly interfering with service restoration, and in any event, within three hours after the beginning of the interruption.)

(f) Any significant incident on an electric utility system which results in a continuous outage of three hours or longer to over 50,000 customers (meters, delivery points) or more than one half of the reporting entity's total customers, whichever is less. (ACO shall be notified within 24 hours of the occurrence if practicable, or as soon thereafter as practicable.)

(Approved by the Office of Management and Budget under control number 1903-0045)

§ 205.352 Information to be reported.

The power supply data shall be supplied to the ACO in accordance with the current DOE pamphlet on reporting procedures. The initial report should include the utility name; the area affected; the time of occurrence of the initiating event; the duration or an estimate of the likely duration; an estimate of the number of customers and amount of load involved; and whether any known critical services such as hospitals, military installations, pumping stations, or air traffic control systems, were or are interrupted. To the extent known or suspected, the report shall include a description of the events initiating the disturbance. The DOE may require further clarification during or after restoration of service.

(Approved by the Office of Management and Budget under control number 1903-0045)

§ 205.353 Fuel emergencies.

The ACO shall be notified whenever a utility or other subject entity determines that a fuel supply emergency exists or is projected to occur. A fuel supply emergency exists when supplies of fuels or hydroelectric storage for

generation are at a level or projected to be at a level which would threaten the reliability or adequacy of electric service. The following factors should be taken into account to determine whether a fuel emergency exists:

(a) Fuel stocks or hydro storage levels are 50 percent or less of normal for that particular time of the year; and

(b) A continued downward trend in fuel stocks or hydro storage levels is projected. (ACO shall be notified as soon as practicable, but no later than three days after the determination is made.)

(Approved by the Office of Management and Budget under control number 1903-0045)

§ 205.354 Special investigations and reports.

If directed by the Director, Office of Energy Emergency Operations, in writing and noticed in the **FEDERAL REGISTER**, a utility or other subject entity experiencing a condition described in § 205.351 above shall submit a full report of the technical circumstances surrounding the power system disturbance, including the restoration procedures utilized. The report shall be filed at such time as may be directed by the Director, Office of Energy Emergency Operations.

(Approved by the Office of Management and Budget under control number 1903-0045)

EMERGENCY INTERCONNECTION OF ELECTRIC FACILITIES AND THE TRANSFER OF ELECTRICITY TO ALLEVIATE AN EMERGENCY SHORTAGE OF ELECTRIC POWER

AUTHORITY: Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (42 U.S.C. 7101); Federal Power Act, Pub. L. 66-280, 41 Stat. 1063 (16 U.S.C. 791(a))

SOURCE: Sections 205.370 through 205.379 appear at 46 FR 39987, Aug. 6, 1981, unless otherwise noted.

§ 205.370 Applicability.

Sections 202(c) and 202(d) of the Federal Power Act are applicable to any "entity" which owns or operates electric power generation, transmission or distribution facilities. An "entity" is a private or public corpora-

tion (utility), a governmental agency, a municipality, a cooperative or a lawful association of the foregoing. Under this section, the DOE has the authority to order the temporary connection of facilities, or the generation or delivery of electricity, which it deems necessary to alleviate an emergency. Such orders shall be effective for the time specified and will be subject to the terms and conditions the DOE specifies. The DOE retains the right to cancel, modify or otherwise change any order, with or without notice, hearing, or report. Requests for action under these regulations will be accepted from any "entity," State Public Utility Commission, State Energy Agency, or State Governor. Actions under these regulations also may be initiated by the DOE on its own motion. Orders under this authority may be made effective without prior notice.

§ 205.371 Definition of emergency.

"Emergency," as used herein, is defined as an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power. Such events may be the result of weather conditions, acts of God, or unforeseen occurrences not reasonably within the power of the affected "entity" to prevent. An emergency also can result from a sudden increase in customer demand, an inability to obtain adequate amounts of the necessary fuels to generate electricity, or a regulatory action which prohibits the use of certain electric power supply facilities. Actions under this authority are envisioned as meeting a specific inadequate power supply situation. Extended periods of insufficient power supply as a result of inadequate planning or the failure to construct necessary facilities can result in an emergency as contemplated in these regulations. In such cases, the impacted "entity" will be expected to make firm arrangements to resolve the problem until new facilities become available, so that a continuing emergency order is not needed. Situations where a shortage of electric energy is projected due solely to the failure of parties

to agree to terms, conditions or other economic factors relating to service, generally will not be considered as emergencies unless the inability to supply electric service is imminent. Where an electricity outage or service inadequacy qualifies for a section 202(c) order, contractual difficulties alone will not be sufficient to preclude the issuance of an emergency order.

§ 205.372 Filing procedures; number of copies.

An original and two conformed copies of the applications and reports required under §§ 205.370 through 205.379 shall be filed with the Division of Power Supply and Reliability, Department of Energy. Copies of all documents also shall be served on:

- (a) The Federal Energy Regulatory Commission;
- (b) Any State Regulatory Agency having responsibility for service standards, or rates of the "entities" that are affected by the requested order;
- (c) Each "entity" suggested as a potential source for the requested emergency assistance;
- (d) Any "entity" that may be a potential supplier of transmission services;
- (e) All other "entities" not covered under paragraphs (c) and (d) of this section which may be directly affected by the requested order; and
- (f) The appropriate Regional Reliability Council.

§ 205.373 Application procedures.

Every application for an emergency order shall set forth the following information as required. This information shall be considered by the DOE in determining that an emergency exists and in deciding to issue an order pursuant to sections 202(c) and 202(d) of the Federal Power Act.

- (a) The exact legal name of the applicant and of all other "entities" named in the application.
- (b) The name, title, post office address, and telephone number of the person to whom correspondence in regard to the application shall be addressed.
- (c) The political subdivision in which each "entity" named in the applica-

tion operates, together with a brief description of the area served and the business conducted in each location.

(d) Each application for a section 202(c) order shall include the following baseline data:

(1) Daily peak load and energy requirements for each of the past 30 days and projections for each day of the expected duration of the emergency;

(2) All capacity and energy receipts or deliveries to other electric utilities for each of the past 30 days, indicating the classification for each transaction;

(3) The status of all interruptible customers for each of the past 30 days and the anticipated status of these customers for each day of the expected duration of the emergency, assuming both the granting and the denial of the relief requested herein;

(4) All scheduled capacity and energy receipts or deliveries to other electric utilities for each day of the expected duration of the emergency.

(e) A description of the situation and a discussion of why this is an emergency, including any necessary background information. This should include any contingency plan of the applicant and the current level of implementation.

(f) A showing that adequate electric service to firm customers cannot be maintained without additional power transfers.

(g) A description of any conservation or load reduction actions that have been implemented. A discussion of the achieved or expected results or these actions should be included.

(h) A description of efforts made to obtain additional power through voluntary means and the results of such efforts; and a showing that the potential sources of power and/or transmission services designated pursuant to paragraphs (i) through (k) of this section informed that the applicant believed that an emergency existed within the meaning of § 205.371.

(i) A listing of proposed sources and amounts of power necessary from each source to alleviate the emergency and a listing of any other "entities" that may be directly affected by the requested order.

(j) Specific proposals to compensate the supplying "entities" for the emergency services requested and to compensate any transmitting "entity" for services necessary to deliver such power.

(k) A showing that, to the best of the applicant's knowledge, the requested relief will not unreasonably impair the reliability of any "entity" directly affected by the request in order to render adequate service to customers.

(l) Description of the facilities to be used to transfer the requested emergency service to the applicant's system.

(1) If a temporary interconnection is proposed under the provisions of section 202, is proposed independently, the following additional information shall be supplied for each such interconnection:

(i) Proposed location;

(ii) Required thermal capacity and power transfer capability of the interconnection;

(iii) Type of emergency services requested, including anticipated duration;

(iv) An electrical one line diagram;

(v) A description of all necessary materials and equipment; and

(vi) The projected length of time necessary to complete the interconnection.

(2) If the requested emergency assistance is to be supplied over existing facilities, the following information shall be supplied for each existing interconnection:

(i) Location;

(ii) Thermal capacity of power transfer capability of interconnection facilities; and

(iii) Type and duration of emergency services requested.

(m) A general or key map on a scale not greater than 100 kilometers to a centimeter showing, in separate color, the territory serviced by each "entity" named in the application; the location of the facilities to be used for the generation and transmission of the requested emergency service; and connection points between systems.

(n) An estimate of the construction costs of any proposed temporary facilities and a statement estimating the

pected operation and maintenance costs on an annualized basis. (Not required on section 202(d) applications.)

(o) Applicants may be required to furnish such supplemental information as the DOE may deem pertinent.

§ 205.374 Responses from "entities" designated in the application.

Each "entity" designated as a potential source of emergency assistance or as a potential supplier of transmission services and which has received a copy of the application under § 205.373, shall have three (3) calendar days from the time of receipt of the application to file the information designated below with the DOE. The DOE will grant extensions of the filing period when appropriate. The designated "entities" shall provide an analysis of the impact the requested action would have on its system reliability and its ability to supply its own interruptible and firm customers. The effects of the requested action on the ability to serve firm loads shall be clearly distinguished from the ability to serve contractually interruptible loads. The designated "entity" also may provide other information relevant to the requested action, which is not included in the reliability analysis. Copies of any response shall be provided to the applicant, the Federal Energy Regulatory Commission, any State Regulatory Agency having responsibility for service standards or rates of any "entity" that may be directly involved in the proposed action, and the appropriate Regional Electric Reliability Council. Pursuant to section 202(c) of the Federal Power Act, DOE may issue an emergency order even though a designated "entity" has failed to file a timely response.

§ 205.375 Guidelines defining inadequate fuel or energy supply.

An inadequate utility system fuel inventory or energy supply is a matter of managerial and engineering judgment based on such factors as fuels in stock, fuels en route, transportation time, and constraints on available storage facilities. A system may be considered to have an inadequate fuel or energy supply capability when, combined with other conditions, the pro-

jected energy deficiency upon the applicant's system without emergency action by the DOE, will equal or exceed 10 percent of the applicant's then normal daily net energy for load, or will cause the applicant to be unable to meet its normal peak load requirements based upon use of all of its otherwise available resources so that it is unable to supply adequate electric service to its ultimate customers. The following conditions will be considered in determining that a system has inadequate fuel or energy supply capability:

(1) System coal stocks are reduced to 30 days (or less) of normal burn days and a continued downward trend in stock is projected;

(2) System residual oil stocks are reduced to 15 days (or less) of normal burn days and a continued downward trend in stocks is projected;

(3) System distillate oil stocks which cannot be replaced by alternate fuels are reduced to 15 days (or less) of normal burn days and a continued downward trend in stocks is projected;

(4) System natural gas deliveries which cannot be replaced by alternate fuels have been or will be reduced 20 percent below normal requirements and no improvement in natural gas deliveries is projected within 30 days;

(5) Delays in nuclear fuel deliveries will extend a scheduled refueling shutdown by more than 30 days; and

(6) Water supplies required for power generation have been reduced to the level where the future adequacy of the power supply may be endangered and no near term improvement in water supplies is projected.

The use of the prescribed criteria does not preclude an applicant from claiming the existence of an emergency when its stocks of fuel or water exceed the amounts and time frames specified above.

§ 205.376 Rates and charges.

The applicant and the generating or transmitting systems from which emergency service is requested are encouraged to utilize the rates and charges contained in approved existing rate schedules or to negotiate mutually satisfactory rates for the proposed

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transactions. In the event that the DOE determines that an emergency exists under section 202(c), and the "entities" are unable to agree on the rates to be charged, the DOE shall prescribe the conditions of service and refer the rate issues to the Federal Energy Regulatory Commission for determination by that agency in accordance with its standards and procedures.

§ 205.377 Reports.

In addition to the information specified below, the DOE may require additional reports as it deems necessary.

(a) Where the DOE has authorized the temporary connection of transmission facilities, all "entities" whose transmission facilities are thus temporarily interconnected shall report the following information to the DOE within 15 days following completion of the interconnection:

- (1) The date the temporary interconnection was completed;
- (2) The location of the interconnection;
- (3) A description of the interconnection; and
- (4) A one-line electric diagram of the interconnection.

(b) Where the DOE orders the transfer of power, the "entity" receiving such service shall report the following information to the DOE by the 10th of each month for the preceding month's activity for as long as such order shall remain in effect:

- (1) Amounts of capacity and/or energy received each day;
- (2) The name of the supplier;
- (3) The name of any "entity" supplying transmission services; and
- (4) Preliminary estimates of the associated costs.

(c) Where the DOE has approved the installation of permanent facilities that will be used only during emergencies, any use of such facilities shall be reported to the DOE within 24 hours. Details of such usage shall be furnished as deemed appropriate by the DOE after such notification.

(d) Any substantial change in the information provided under § 205.373 shall be promptly reported to the DOE.

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(Approved by the Office of Management and Budget under Control No. 1904-0066)

[46 FR 39989, Aug. 6, 1981, as amended at 46 FR 63209, Dec. 31, 1981]

§ 205.378 Disconnection of temporary facilities.

Upon the termination of any emergency for the mitigation of which the DOE ordered the construction of temporary facilities, such facilities shall be disconnected and any temporary construction removed or otherwise disposed of, unless application is made as provided in § 205.379 for permanent connection for emergency use. This disconnection and removal of temporary facilities shall be accomplished within 30 days of the termination of the emergency unless an extension is granted by the DOE. The DOE shall be notified promptly when such removal of facilities is completed.

§ 205.379 Application for approval of the installation of permanent facilities for emergency use only.

Application for DOE approval of a permanent connection for emergency use only shall conform with the requirements in § 205.373. However, the baseline data specified in § 205.373(d) need not be included in an application made under this section. In addition, the application shall state in full the reasons why such permanent connection for emergency use is in the public interest.

PART 207—COLLECTION OF INFORMATION

Subpart A—Collection of Information Under the Energy Supply and Environmental Coordination Act of 1974

Sec.

207.1 Purpose.

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207.8 Judicial actions.

207.9 Exceptions, exemptions, interpretations, rulings and rulemaking.

AUTHORITY: Federal Energy Administration Act of 1974, Pub. L. 93-275; Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319; E.O. 11790, 39 FR 23165.

SOURCE: 40 FR 18409, Apr. 28, 1975, unless otherwise noted.

Subpart A—Collection of Information Under the Energy Supply and Environmental Coordination Act of 1974

§ 207.1 Purpose.

The purpose of this subpart is to set forth the manner in which energy information which the Administrator is authorized to obtain by sections 11 (a) and (b) of ESECA will be collected.

§ 207.2 Definitions.

As used in this subpart:

"Administrator" means the Federal Energy Administrator or his delegate.

"Energy information" includes all information in whatever form on (1) fuel reserves, exploration, extraction, and energy resources (including petrochemical feedstocks) wherever located; (2) production, distribution, and consumption of energy and fuels, wherever carried on; and (3) matters relating to energy and fuels such as corporate structure and proprietary relationships, costs, prices, capital investment, and assets, and other matters directly related thereto, wherever they exist.

"ESECA" means the Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319).

"EPAA" means the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93-159).

"DOE" means the Department of Energy.

"Person" means any natural person, corporation, partnership, association, consortium, or any entity organized for a common business purpose, wherever situated, domiciled, or doing business, who directly or through other persons subject to their control does business in any part of the United States.

"United States," when used in the geographical sense, means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

§ 207.3 Method of collecting energy information under ESECA.

(a) Whenever the Administrator determines that:

(1) Certain energy information is necessary to assist in the formulation of energy policy or to carry out the purposes of the ESECA of the EPAA; and

(2) Such energy information is not available to DOE under the authority of statutes other than ESECA or that such energy information should, as a matter of discretion, be collected under the authority of ESECA;

He shall require reports of such information to be submitted to DOE at least every ninety calendar days.

(b) The Administrator may require such reports of any person who is engaged in the production, processing, refining, transportation by pipeline, or distribution (at other than the retail level) of energy resources.

(c) The Administrator may require such reports by rule, order, questionnaire, or such other means as he determines appropriate.

(d) Whenever reports of energy information are requested under this subpart, the rule, order, questionnaire, or other means requesting such reports shall contain (or be accompanied by) a recital that such reports are being requested under the authority of ESECA.

(e) In addition to requiring reports, the Administrator may, at his discretion, in order to obtain energy information under the authority of ESECA:

(1) Sign and issue subpoenas in accordance with the provisions of § 205.8 of this chapter for the attendance and testimony of witnesses and the production of books, records, papers, and other documents;

(2) Require any person, by rule or order, to submit answers in writing to interrogatories, requests for reports or for other information, with such answers or other submissions made within such reasonable period as is specified in the rule or order, and under oath; and

(3) Administer oaths.

Any such subpoena or rule or order shall contain (or be accompanied by) a recital that energy information is requested under the authority of ESECA.

(f) For the purpose of verifying the accuracy of any energy information requested, acquired, or collected by the DOE, the Administrator, or any officer or employee duly designated by him, upon presenting appropriate credentials and a written notice from the Administrator to the owner, operator, or agent in charge, may—

(1) Enter, at reasonable times, any business premise of facility; and

(2) Inspect, at reasonable times and in a reasonable manner, any such premise or facility, inventory and sample any stock of energy resources therein, and examine and copy books, records, papers, or other documents, relating to any such energy information.

Such written notice shall reasonably describe the premise or facility to be inspected, the stock to be inventoried or sampled, or the books, records, papers or other documents to be examined or copied.

§ 207.4 Confidentiality of energy information.

(a) Information obtained by the DOE under authority of ESECA shall be available to the public in accordance with the provisions of Part 202 of this chapter. Upon a showing satisfactory to the Administrator by any person that any energy information obtained under this subpart from such person would, if made public, divulge methods or processes entitled to protection as trade secrets or other proprietary information of such person, such information, or portion thereof, shall be deemed confidential in accordance with the provisions of section 1905 of Title 18, United States Code; except that such information, or part thereof, shall not be deemed confidential pursuant to that section for purposes of disclosure, upon request, to (1) any delegate of the DOE for the purpose of carrying out ESECA or the EPAA, (2) the Attorney General, the Secretary of the Interior, the Federal Trade Commission, the Federal Power Commission, or the General Account-

ing Office, when necessary to carry out those agencies' duties and responsibilities under ESECA and other statutes, and (3) the Congress, or any Committee of Congress upon request of the Chairman.

(b) Whenever the Administrator requests reports of energy information under this subpart, he may specify (in the rule, order or questionnaire or other means by which he has requested such reports) the nature of the showing required to be made in order to satisfy DOE that certain energy information contained in such reports warrants confidential treatment in accordance with this section. He shall, to the maximum extent practicable, either before or after requesting reports, by ruling or otherwise, inform respondents providing energy information pursuant to this subpart of whether such information will be made available to the public pursuant to requests under the Freedom of Information Act (5 U.S.C. 552).

§ 207.5 Violations.

Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of this subpart or any order issued pursuant thereto is a violation of the DOE regulations stated in this subpart.

§ 207.6 Notice of probable violation and remedial order.

(a) *Purpose and scope.* (1) This section establishes the procedures for determining the nature and extent of violations of this subpart and the procedures for issuance of a notice of probable violation, a remedial order or a remedial order for immediate compliance.

(2) When the DOE discovers that there is reason to believe a violation of any provision of this subpart, or any order issued thereunder, has occurred, is continuing or is about to occur, the DOE may conduct proceedings to determine the nature and extent of the violation and may issue a remedial order thereafter. The DOE may commence such proceeding by serving a notice of probable violation or by issu-

ing a remedial order for immediate compliance.

(b) *Notice of probable violation.* (1) The DOE may begin a proceeding under this subpart by issuing a notice of probable violation if the DOE has reason to believe that a violation has occurred, is continuing, or is about to occur.

(2) Within 10 days of the service of a notice of probable violation, the person upon whom the notice is served may file a reply with the DOE office that issued the notice of probable violation at the address provided in § 205.12 of this chapter. The DOE may extend the 10-day period for good cause shown.

(3) The reply shall be in writing and signed by the person filing it. The reply shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the notice of probable violation. Such facts shall include a complete statement of the business or other reasons that justify the act or transaction, if appropriate; a detailed description of the act or transaction; and a full discussion of the pertinent provisions and relevant facts reflected in any documents submitted with the reply. Copies of all relevant documents shall be submitted with the reply.

(4) The reply shall include a discussion of all relevant authorities, including, but not limited to, DOE rulings, regulations, interpretations, and decisions on appeals and exceptions relied upon to support the particular position taken.

(5) The reply should indicate whether the person requests or intends to request a conference regarding the notice. Any request not made at the time of the reply shall be made as soon thereafter as possible to insure that the conference is held when it will be most beneficial. A request for a conference must conform to the requirements of Subpart M of Part 205 of this chapter.

(6) If a person has not filed a reply with the DOE within the 10-day period provided, and the DOE has not extended the 10-day period, the person shall be deemed to have conceded the accuracy of the factual alle-

gations and legal conclusions stated in the notice of probable violation.

(7) If the DOE finds, after the 10-day period provided in § 207.6(b)(2), that no violation has occurred, is continuing, or is about to occur, or that for any reason the issuance of a remedial order would not be appropriate, it shall notify, in writing, the person to whom a notice of probable violation has been issued that the notice is rescinded.

(c) *Remedial order.* (1) If the DOE finds, after the 10-day period provided in § 207.6(b)(2), that a violation has occurred, is continuing, or is about to occur, the DOE may issue a remedial order. The order shall include a written opinion setting forth the relevant facts and the legal basis of the remedial order.

(2) A remedial order issued under this subpart shall be effective upon issuance, in accordance with its terms, until stayed, suspended, modified or rescinded. The DOE may stay, suspend, modify or rescind a remedial order on its own initiative or upon application by the person to whom the remedial order is issued. Such action and application shall be in accordance with the procedures for such proceedings provided for in Part 205 of this chapter.

(3) A remedial order may be referred at any time to the Department of Justice for appropriate action in accordance with § 207.7.

(d) *Remedial order for immediate compliance.* (1) Notwithstanding paragraphs (b) and (c) of this section, the DOE may issue a remedial order for immediate compliance, which shall be effective upon issuance and until rescinded or suspended, if it finds:

(i) There is a strong probability that a violation has occurred, is continuing or is about to occur;

(ii) Irreparable harm will occur unless the violation is remedied immediately; and

(iii) The public interest requires the avoidance of such irreparable harm through immediate compliance and waiver of the procedures afforded under paragraphs (b) and (c) of this section.

(2) A remedial order for immediate compliance shall be served promptly

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upon the person against whom such order is issued by telex or telegram, with a copy served by registered or certified mail. The copy shall contain a written statement of the relevant facts and the legal basis for the remedial order for immediate compliance, including the findings required by paragraph (d)(1) of this section.

(3) The DOE may rescind or suspend a remedial order for immediate compliance if it appears that the criteria set forth in paragraph (d)(1) of this section are no longer satisfied. When appropriate, however, such a suspension or rescission may be accompanied by a notice of probable violation issued under paragraph (b) of this section.

(4) If at any time in the course of a proceeding commenced by a notice of probable violation the criteria set forth in paragraph (d)(1) of this section are satisfied, the DOE may issue a remedial order for immediate compliance, even if the 10-day period for reply specified in § 207.6(b)(2) of this part has not expired.

(5) At any time after a remedial order for immediate compliance has become effective the DOE may refer such order to the Department of Justice for appropriate action in accordance with § 207.7 of this part.

(e) *Remedies.* A remedial order or a remedial order for immediate compliance may require the person to whom it is directed to take such action as the DOE determines is necessary to eliminate or to compensate for the effects of a violation.

(f) *Appeal.* (1) No notice of probable violation issued pursuant to this subpart shall be deemed to be an action of which there may be an administrative appeal.

(2) Any person to whom a remedial order or a remedial order for immediate compliance is issued under this subpart may file an appeal with the DOE Office of Exceptions and Appeals in accordance with the procedures for such appeal provided in Subpart H of Part 205 of this chapter. The appeal must be filed within 10 days of service of the order from which the appeal is taken.

§ 207.7 Sanctions.

(a) *General.* (1) Penalties and sanctions shall be deemed cumulative and not mutually exclusive.

(2) Each day that a violation of the provisions of this subpart or any order issued pursuant thereto continues shall be deemed to constitute a separate violation within the meaning of the provisions of this subpart relating to criminal fines and civil penalties.

(b) *Criminal penalties.* Any person who willfully violates any provision of this subpart or any order issued pursuant thereto shall be subject to a fine of not more than \$5,000 for each violation. Criminal violations are prosecuted by the Department of Justice upon referral by the DOE.

(c) *Civil penalties.* (1) Any person who violates any provision of this subpart or any order issued pursuant thereto shall be subject to a civil penalty of not more than \$2,500 for each violation. Actions for civil penalties are prosecuted by the Department of Justice upon referral by the DOE.

(2) When the DOE considers it to be appropriate or advisable, the DOE may compromise and settle, and collect civil penalties.

§ 207.8 Judicial actions.

(a) *Enforcement of subpoenas; contempt.* Any United States district court within the jurisdiction of which any inquiry is carried on may, upon petition by the Attorney General at the request of the Administrator, in the case of refusal to obey a subpoena or order of the Administrator issued under this subpart, issue an order requiring compliance. Any failure to obey such an order of the court may be punished by the court as contempt.

(b) *Injunctions.* Whenever it appears to the Administrator that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any regulation or order issued under this subpart, the Administrator may request the Attorney General to bring a civil action in the appropriate district court of the United States to enjoin such acts or practices and, upon a proper showing, a temporary restraining order or preliminary or permanent injunction

shall be granted without bond. The relief sought may include a mandatory injunction commanding any person to comply with any provision of such order or regulation, the violation of which is prohibited by section 12(a) of ESECA, as implemented by this subpart.

§ 207.9 Exceptions, exemptions, interpretations, rulings and rulemaking.

Applications for exceptions, exemptions or requests for interpretations relating to this subpart shall be filed in accordance with the procedures provided in Subparts D, E and F, respectively, of Part 205 of this chapter. Rulings shall be issued in accordance with the procedures of Subpart K of Part 205 of this chapter. Rulemakings shall be undertaken in accordance with the procedures provided in Subpart L of Part 205 of this chapter.

PART 209—INTERNATIONAL VOLUNTARY AGREEMENTS

Subpart A—General Provisions

Sec.

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Subpart B—Development of Voluntary Agreements

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Subpart C—Carrying Out of Voluntary Agreements and Developing and Carrying Out of Plans of Actions

- 209.31 Purpose and scope.
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Subpart D—Availability of Information Relating to Meetings and Communications

- 209.41 Availability of information relating to meetings and communications.

AUTHORITY: Federal Energy Administration Act of 1974, Pub. L. 93-275; E.O. 11790, 39 FR 23185; Energy Policy and Conservation Act, Pub. L. 94-163, unless otherwise noted.

SOURCE: 41 FR 6754, Feb. 13, 1976, unless otherwise noted.

Subpart A—General Provisions

§ 209.1 Purpose and scope.

This part implements the provisions of the Energy Policy and Conservation Act (EPCA) authorizing the Administrator to prescribe standards and procedures by which persons engaged in the business of producing, transporting, refining, distributing, or storing petroleum may develop and carry out voluntary agreements, and plans of action which are required to implement the information and allocation provisions of the International Energy Program (IEP). The requirements of this part do not apply to activities other than those for which section 252 of EPCA makes available a defense to the antitrust laws.

§ 209.2 Delegation.

To the extent otherwise permitted by law, any authority, duty, or responsibility vested in DOE or the Administrator under these regulations may be delegated to any regular full-time employee of the Department of Energy, and, by agreement, to any regular full-time employee of the Department of Justice or the Department of State.

§ 209.3 Definitions.

For purposes of this part—

(a) "Administrator" means the Administrator of the Department of Energy.

(b) "Information and allocation provisions of the International Energy Program" means the provisions of Chapter V of the Program relating to the Information System, and the provisions at Chapters III and IV thereof relating to the international allocation of petroleum.

(c) "International Energy Agency" (IEA) means the International Energy Agency established by Decision of the Council of the Organization for Economic Cooperation and Development, dated November 15, 1974.

(d) "International Energy Program" (IEP) means the program established pursuant to the Agreement on an International Energy Program signed

at Paris on November 18, 1974, including (1) the Annex entitled "Emergency Reserves", (2) any amendment to such Agreement which includes another nation as a Party to such Agreement, and (3) any technical or clerical amendment to such Agreement.

(e) "International energy supply emergency" means any period (1) beginning on any date which the President determines allocation of petroleum products to nations participating in the international energy program is required by Chapters III and IV of such program, and (2) ending on a date on which he determines such allocation is no longer required. Such a period shall not exceed 90 days, except where the President establishes one or more additional periods by making the determination under paragraph (e)(1) of this section.

(f) "Potential participant" means any person engaged in the business of producing, transporting, refining, distributing, or storing petroleum products; "participant" means any such person who agrees to participate in a voluntary agreement pursuant to a request to do so by the Administrator.

(g) "Petroleum" or "petroleum products" means crude oil, residual fuel oil, or any refined petroleum product (including any natural gas liquid and any natural gas liquid product).

Subpart B—Development of Voluntary Agreements

§ 209.21 Purpose and scope.

(a) This subpart establishes the standards and procedures by which persons engaged in the business of producing, transporting, refining, distributing, or storing petroleum products shall develop voluntary agreements which are required to implement the allocation and information provisions of the International Energy Program.

(b) This subpart does not apply to meetings of bodies created by the International Energy Agency.

§ 209.22 Initiation of meetings.

(a) Any meeting held for the purpose of developing a voluntary agreement involving two or more potential

participants shall be initiated and chaired by the Administrator or other regular full-time Federal employee designated by him.

(b) DOE shall provide notice of meetings held pursuant to this subpart, in writing, to the Attorney General, the Federal Trade Commission, and to the Speaker of the House and the President of the Senate for delivery to the appropriate committees of Congress, and to the public through publication in the *FEDERAL REGISTER*. Such notice shall identify the time, place, and agenda of the meeting, and such other matters as the Administrator deems appropriate. Notice in the *FEDERAL REGISTER* shall be published at least seven days prior to the date of the meeting.

§ 209.23 Conduct of meetings.

(a) Meetings to develop a voluntary agreement held pursuant to this subpart shall be open to all interested persons. Interested persons desiring to attend meetings under this subpart may be required pursuant to notice to advise the Administrator in advance.

(b) Interested persons may, as set out in notice provided by the Administrator, present data, views, and arguments orally and in writing, subject to such reasonable limitations with respect to the manner of presentation as the Administrator may impose.

§ 209.24 Maintenance of records.

(a) The Administrator shall keep a verbatim transcript of any meeting held pursuant to this subpart.

(b)(1) Except as provided in paragraphs (b) (2) through (4) of this section, potential participants shall keep a full and complete record of any communications (other than in a meeting held pursuant to this subpart) between or among themselves for the purpose of developing a voluntary agreement under this part. When two or more potential participants are involved in such a communication, they may agree among themselves who shall keep such record. Such record shall include the names of the parties to the communication and the organizations, if any, which they represent; the date of the communication; the

means of communication; and a description of the communication in sufficient detail to convey adequately its substance.

(2) Where any communication is written (including, but not limited to, telex, telegraphic, telecopied, micro-filmed and computer printout material), and where such communication demonstrates on its face that the originator or some other source furnished a copy of the communication to the Office of International Affairs, Department of Energy with the notation "Voluntary Agreement" marked on the first page of the document, no participant need record such a communication or send a further copy to the Department of Energy. The Department of Energy may, upon written notice to potential participants, from time to time, or with reference to particular types of documents, require deposit with other offices or officials of the Department of Energy. Where such communication demonstrates that it was sent to the Office of International Affairs, Department of Energy with the notation "Voluntary Agreement" marked on the first page of the document, or such other offices or officials in the Department of Energy has designated pursuant to this section it shall satisfy paragraph (c) of this section, for the purpose of deposit with the Department of Energy.

(3) To the extent that any communication is procedural, administrative or ministerial (for example, if it involves the location of a record, the place of a meeting, travel arrangements, or similar matters), only a brief notation of the date, time, persons involved and description of the communication need be recorded.

(4) To the extent that any communication involves matters which recapitulate matters already contained in a full and complete record, the substance of such matters shall be identified, but need not be recorded in detail, provided that reference is made to the record and the portion thereof in which the substance is fully set out.

(c) Except where the Department of Energy otherwise provides, all records and transcripts prepared pursuant to paragraphs (a) and (b) of this section,

shall be deposited within fifteen (15) days after the close of the month of their preparation together with any agreement resulting therefrom, with the Department of Energy, and shall be available to the Department of Justice, the Federal Trade Commission, and the Department of State. Such records and transcripts shall be available for public inspection and copying to the extent set forth in Subpart D. Any person depositing material pursuant to this section shall indicate with particularity what portions, if any, the person believes are subject to disclosure to the public pursuant to Subpart D and the reasons for such belief.

(d) Any meeting between a potential participant and an official of DOE for the purpose of developing a voluntary agreement shall, if not otherwise required to be recorded pursuant to this section, be recorded by such official as provided in § 204.5.

(Approved by the Office of Management and Budget under Control No. 1905-0079)

(Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, E.O. 11790, 39 FR 23185; E. O. 11930 41 FR 32397; Energy Policy and Conservation Act, Pub. L. 94-163; E.O. 11912, 41 FR 15825; Department of Energy Organization Act, Pub. L. 95-91; 91 Stat. 565; E.O. 12009, 42 FR 46267)

[41 FR 6754, Feb. 13, 1976, as amended at 43 FR 12854, Mar. 28, 1978; 46 FR 63209, Dec. 31, 1981]

Subpart C—Carrying Out of Voluntary Agreements and Developing and Carrying Out of Plans of Actions

§ 209.31 Purpose and scope.

This subpart establishes the standards and procedures by which persons engaged in the business of producing, transporting, refining, distributing, or storing petroleum products shall carry out voluntary agreements and develop and carry out plans of action which are required to implement the allocation and information provisions of the International Energy Program.

§ 209.32 Initiation of meetings.

(a) Except for meetings of bodies created by the International Energy Agency, any meeting among partici-

pants in a voluntary agreement pursuant to this subpart, for the purpose of carrying out such voluntary agreement or developing or carrying out a plan of action pursuant thereto, shall be initiated and chaired by a full-time Federal employee designated by the Administrator.

(b) Except as provided in paragraph (c) of this section, the Administrator shall provide notice of meetings held pursuant to this subpart, in writing, to the Attorney General, the Federal Trade Commission, and to the Speaker of the House and the President of the Senate for delivery to the appropriate committees of Congress. Except during an international energy supply emergency, notice shall also be provided to the public through publication in the *FEDERAL REGISTER*. Such notice shall identify the time, place, and agenda of the meeting. Notice in the *FEDERAL REGISTER* shall be published at least seven days prior to the date of the meeting unless emergency circumstances, IEP requirements or other unanticipated circumstances require the period to be shortened.

(c) During an international energy supply emergency, advance notice shall be given to the Attorney General, the Federal Trade Commission and to the Speaker of the House and the President of the Senate for delivery to the appropriate committees of Congress. Such notice may be telephonic or by such other means as practicable, and shall be confirmed in writing.

§ 209.33 Conduct of meetings.

(a) Subject to the provisions of paragraph (c) of this section, meetings held to carry out a voluntary agreement, or to develop or carry out a plan of action pursuant to this subpart, shall be open to all interested persons, subject to limitations of space. Interested persons desiring to attend meetings under this subpart may be required to advise the Administrator in advance.

(b) Interested persons permitted to attend meetings under this section may present data, views, and arguments orally and in writing, subject to such limitations with respect to the manner of presentation as the Administrator may impose.

(c) Meetings held pursuant to this subpart shall not be open to the public to the extent that the President or his delegate finds that disclosure of the proceedings beyond those authorized to attend would be detrimental to the foreign policy interests of the United States, and determines, in consultation with the Administrator, the Secretary of State, and the Attorney General, that a meeting shall not be open to interested persons or that attendance by interested persons shall be limited.

(d) The requirements of this section do not apply to meetings of bodies created by the International Energy Agency except that no participant in a voluntary agreement may attend any meeting of any such body held to carry out a voluntary agreement or to develop or to carry out a plan of action unless a full-time Federal employee is present.

§ 209.34 Maintenance of records.

(a) The Administrator or his delegate shall keep a verbatim transcript of any meeting held pursuant to this subpart except where (1) due to considerations of time or other overriding circumstances, the keeping of a verbatim transcript is not practicable, or (2) principal participants in the meeting are representatives of foreign governments. If any such record other than a verbatim transcript, is kept by a designee who is not a full-time Federal employee, that record shall be submitted to the full-time Federal employee in attendance at the meeting who shall review the record, promptly make any changes he deems necessary to make the record full and complete, and shall notify the designee of such changes.

(b)(1) Except as provided in paragraphs (b) (2) through (4) of this section, participants shall keep a full and complete record of any communication (other than in a meeting held pursuant to this subpart) between or among themselves or with any other member of a petroleum industry group created by the International Energy Agency, or subgroup thereof for the purpose of carrying out a voluntary agreement or developing or carrying out a plan of action under this subpart, except that where there are several communica-

tions within the same day involving the same participants, they may keep a cumulative record for the day. The parties to a communication may agree among themselves who shall keep such record. Such record shall include the names of the parties to the communication and the organizations, if any, which they represent; the date of communication; the means of communication, and a description of the communication in sufficient detail to convey adequately its substance.

(2) Where any communication is written (including, but not limited to, telex, telegraphic, telecopied, microfilm and computer printout material), and where such communication demonstrates on its face that the originator or some other source furnished a copy of the communication to the Office of International Affairs, Department of Energy with the notation "Voluntary Agreement" on the first page of the document, no participants need record such a communication or send a further copy to the Department of Energy. The Department of Energy may, upon written notice to participants, from time to time, or with reference to particular types of documents, require deposit with other offices or officials of the Department of Energy. Where such communication demonstrates that it was sent to the Office of International Affairs, Department of Energy with the notation "Voluntary Agreement" on the first page of the document, or such other offices or officials as the Department of Energy has designated pursuant to this section, it shall satisfy paragraph (c) of this section, for the purpose of deposit with the Department of Energy.

(3) To the extent that any communication is procedural, administrative or ministerial (for example, if it involves the location of a record, the place of a meeting, travel arrangements, or similar matters) only a brief notation of the date, time, persons involved and description of the communication need be recorded; except that during an IEA emergency allocation exercise or an allocation systems test such a non-substantive communication between members of the Industry Supply Advisory Group (ISAG) which

occur within IEA headquarters need not be recorded.

(4) To the extent that any communication involves matters which recapitulate matters already contained in a full and complete record, the substance of such matters shall be identified, but need not be recorded in detail, provided that reference is made to the record and the portion thereof in which the substance is fully set out.

(c) Except where the Department of Energy otherwise provides, all records and transcripts prepared pursuant to paragraphs (a) and (b) of this section, shall be deposited within seven (7) days after the close of the week (ending Saturday) of their preparation during an international energy supply emergency or a test of the IEA emergency allocation system, and within fifteen (15) days after the close of the month of their preparation during periods of non-emergency, together with any agreement resulting therefrom, with the Department of Energy and shall be available to the Department of Justice, the Federal Trade Commission, and the Department of State. Such records and transcripts shall be available for public inspection and copying to the extent set forth in Subpart D. Any person depositing materials pursuant to this section shall indicate with particularity what portions, if any, the person believes are not subject to disclosure to the public pursuant to Subpart D and the reasons for such belief.

(d) Any meeting between a participant and an official of DOE for the purpose of carrying out a voluntary agreement or developing or carrying out a plan of action shall, if not otherwise required to be recorded pursuant to this section, be recorded by such official as provided in § 204.5.

(e) During international oil allocation under Chapters III and IV of the IEP or during an IEA allocation systems test, the Department of Energy may issue such additional guidelines amplifying the requirements of these regulations as the Department of Energy determines to be necessary and appropriate.

(Approved by the Office of Management and Budget under Control No. 1905-0067)

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(Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended; E.O. 11790, 39 FR 23185; E.O. 11930, 41 FR 32397; Energy Policy and Conservation Act, Pub. L. 94-163; E.O. 11912, 41 FR 15825; Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565, E.O. 12009, 42 FR 46267)

[41 FR 6754, Feb. 13, 1976, as amended at 43 FR 12854, Mar. 28, 1978; 46 FR 63209, Dec. 31, 1981]

Subpart D—Availability of Information Relating to Meetings and Communications

§ 209.41 Availability of information relating to meetings and communications.

(a) Except as provided in paragraph (b) of this section, records or transcripts prepared pursuant to this subpart shall be available for public inspection and copying in accordance with section 552 of Title 5, United States Code and Part 202 of this title.

(b) Matter may be withheld from disclosure under section 552(b) of Title 5 only on the grounds specified in:

(1) Section 552(b)(1), applicable to matter specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy. This section shall be interpreted to include matter protected under Executive Order No. 11652 of March 8, 1972, establishing categories and criteria for classification, as well as any other such orders dealing specifically with disclosure of IEP related materials;

(2) Section 552(b)(3), applicable to matter specifically exempted from disclosure by statute; and

(3) So much of section 552(b)(4) as relates to trade secrets.

PART 210—GENERAL ALLOCATION AND PRICE RULES

Subpart A—Recordkeeping

Sec.

210.1 Records.

Subparts B—C—[Reserved]

Subpart D—General Rules

210.61 Retaliatory actions.

AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33577; Economic Stabilization Act of

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1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11748, 38 FR 33575; Cost of Living Council Order Number 47, 39 FR 24.

Subpart A—Recordkeeping

§ 210.1 Records.

(a) The recordkeeping requirements that were in effect on January 27, 1981, in Parts 210, 211, and 212 will remain in effect for (1) all transactions prior to February 1, 1981; and (2) all allowed expenses incurred and paid prior to April 1, 1981 under § 212.78 of Part 212. These requirements include, but are not limited to, the requirements that were in effect on January 27, 1981, in § 210.92 of this part; in §§ 211.67(a)(5)(ii); 211.89; 211.109, 211.127; and 211.223 of Part 211; and in §§ 212.78(h)(5)(ii); 212.78(h)(6); 212.83(c)(2)(iii)(E)(i); 212.83(c)(2)(iii)(E)(ii); 212.83(c)(2)(iii); "F"; 212.83(i); 212.93(a); 212.93(b)(4)(iii)(B)(i); 212.93(i)(4); 212.94(b)(2)(iii); 212.128; 212.132; 212.172; and § 212.187 of Part 212.

(b) Effective February 5, 1985, paragraph (a) of this section shall apply, to the extent indicated, only to firms in the following categories. A firm may be included in more than one category, and a firm may move from one category to another. The fact that a firm becomes no longer subject to the recordkeeping requirements of one category shall not relieve that firm of compliance with the recordkeeping requirements of any other category in which the firm is still included.

(1) Those firms which are or become parties in litigation with DOE, as defined in paragraph (c)(1) of this section. Any such firm shall remain subject to paragraph (a) of this section. DOE shall notify the firm in writing of the final resolution of the litigation and whether or not any of its records must be maintained for a further period. DOE shall notify a firm which must maintain any records for a further period when such records are no longer needed.

(2)(i) Those firms which as of November 30 1984, have completed making all restitutionary payments required by an administrative or judicial

order, consent order, or other settlement or order but which payments are on February 5, 1985, still subject to distribution by DOE. This requirement is applicable to only those firms listed in Appendix B. Any such firm shall maintain all records for the time period covered by the administrative or judicial order, consent order, or other settlement or order requiring the payments, evidencing sales volume data for each product subject to controls and customers' names and addresses, until one of the following: June 30, 1985, unless this period is extended on a firm-by-firm basis; the end of the individual firm's extension; or the firm is notified in writing that its records are no longer needed.

(ii) Those firms which as of November 30, 1984, are required to make restitutionary or other payments pursuant to an administrative or judicial order, consent order, or other settlement or order. Any such firm shall remain subject to paragraph (a) of this section until the firm completes all restitutionary payments required by the administrative or judicial order, consent order, or other settlement or order. However, after completing all such payments, a firm shall maintain all records described in paragraph (b)(2)(i) of this section until one of the following: Six months after the firm completes all such payments, unless this period is extended on a firm-by-firm basis; the end of the individual firm's extension; or the firm is notified in writing that its records are no longer needed.

(3)(i) Those firms with completed audits in which DOE has not yet made a determination to initiate a formal enforcement action and firms under audit which do not have outstanding subpoenas. Any such firm shall maintain all records for the period covered by the audit including all records necessary to establish historical prices or volumes which serve as the basis for determining the lawful prices or volumes for any subsequent regulated transaction which is subject to audit, until one of the following: June 30, 1985, unless this period is extended on a firm-by-firm basis; the end of the individual firm's extension; or the firm is notified in writing by DOE that its

records are no longer needed. However, if a firm in this group shall become a party in litigation, the firm shall then be subject to the recordkeeping requirements for firms in litigation set forth in paragraph (b)(1) of this section.

(ii) Those firms under audit which have outstanding subpoenas on February 5, 1985, or which receive subpoenas at any time thereafter or which have supplied records for an audit as the result of a subpoena enforced after November 1, 1983. Any such firm shall remain subject to paragraph (a) of this section until two years after ERA has notified the firm in writing that it is in full compliance with the subpoena or until ERA has received from the firm a sworn certification of compliance with the subpoena as required by 10 CFR 205.8. However, if a firm in this group shall become a party in litigation, the firm shall then be subject to the recordkeeping requirements for firms in litigation set forth in paragraph (b)(1) of this section.

(4) Those firms which are subject to requests for data necessary to verify that crude oil qualifies as "newly discovered" crude oil under 10 CFR 212.79. Any such firm shall maintain the records evidencing such data until one of the following: June 30, 1985, unless this period is extended on a firm-by-firm basis; the end of an individual firm's extension; or the firm is notified in writing by DOE that its records are no longer needed. However, if a firm in this group shall become a party in litigation, the firm shall then be subject to the recordkeeping requirements for firms in litigation set forth in paragraph (b)(1) of this section.

(5) Those firms whose records are determined by DOE as necessary to complete the enforcement activity relating to another firm which is also subject to paragraph (a) of this section unless such firms required to keep records have received certified notice letters specifically describing the records determined as necessary. At that time, the specific notice will control the recordkeeping requirements. These firms have been identified in Appendix A. Any such firm shall maintain these records until one of

the following: June 30, 1985, unless this period is extended on a firm-by-firm basis; the end of the individual firm's extension; or the firm is notified in writing by DOE that its records are no longer needed.

(6) Those firms which participated in the Entitlements program. Any such firm shall maintain its Entitlements-related records until six months after the final judicial resolution (including any and all appeals) of *Texaco v. DOE*, Nos. 84-391, 84-410, and 84-456 (D. Del.), or the firm is notified by DOE that its records are no longer needed, whichever occurs first.

(c) For purposes of this section:

(1) A firm is "a party in litigation" if:

(i)(A) The firm has received a Notice of Probable Violation, a Notice of Probable Disallowance, a Proposed Remedial Order, or a Proposed Order of Disallowance; or

(B) The firm and DOE are parties in a lawsuit arising under the Emergency Petroleum Allocation Act of 1973, as amended (15 U.S.C. 751 *et seq.*) or 10 CFR Parts 205, 210, 211, or 212; and

(ii)(A) There has been no final (that is, non-appealable) administrative or judicial resolution, or

(B) DOE has not informed the firm in writing that the Department has completed its review of the matter.

(2) A firm means any association, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship, or any other entity, however organized, including charitable, educational, or other eleemosynary institutions, and state and local governments. A firm includes a parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls.

APPENDIX A TO 10 CFR 210.1—THIRD PARTY FIRMS

Name of Firm

A & R, Inc.

A. J. Petroleum

ADA Resources, Inc.

ATC Petroleum

Abcco Petroleum, Inc.

Ada Oil Company

Adams Grocery

Advanced Petroleum Distributing Co.

Agway Inc.

Allegheny Petroleum Corp.

Alliance Oil and Refining Company

Allied Chemical Corp.

Allied Transport

Amerada Hess Corp.

American Natural Crude Oil Assoc.

Amoco Production Company

Amorient Petroleum, Inc.

An-Son Transportation Co.

Anadarko Products Co.

Andrus Energy Corp.

Antler Petroleum

Arco Pipeline Company

Armada Petroleum Corp.

Armour Oil Company

Arnold Brooks Const. Inc.

Ashland Oil

Asiatic Petroleum Co.

Aspen Energy, Inc.

Athens General Hospital

Atlantic Pacific Energy, Inc.

Atlas Processing Company

B & B Trading Company

BLT, Inc.

BPM, Ltd.

Baker Services, Inc.

Basin Inc.

Basin Petroleum, Inc.

Beacon Hill Mobil

Belcher Oil Company

Bigheart Pipeline Company

Bigheart Pipeline Corp

Bowdoin Square Exxon

Bowdoin Super Service (Sunoco)

Brio Petroleum, Inc.

Brixon

C.E. Norman

CPI Oil & Refining

CRA-Farmland Industries, Inc.

Calcasieu Refining, Ltd.

Carbonit Houston, Inc.

Carr Oil Company, Inc.

Castle Coal & Oil Co.

Central Crude Corporation

Century Trading Co.

Charter Crude Oil

Chastain Vineyard

Chevron USA, Inc.

Cibro Petroleum, Inc.

Cirillo Brothers

Cities Service (Citgo) Station

Cities Service Company

Cities Service Midland

City of Athens

Clarke County Board of Education

Claude E. Silvey

Coastal Corporation (The)

Coastal Petroleum and Supply Inc.

Coastal States Trading Company

Commonwealth Oil Refining Co., Inc.

Coral Petroleum Canada, Inc.

Coral Petroleum, Inc.

Corex of Georgia

Cothran Interstate Exxon

Couch's Standard Chevron

Cougar Oil Marketers Inc.

Crude Company (The)

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Crystal Energy Corporation
Crystal Refining
D & E Logging
DDC Corporation of America
Darrell Williamson
Davis Ellis
Days Inn of America, Inc.
Delta Petroleum & Energy Corp.
Derby & Company, Inc.
Derby Refining Company
Dewveall Petroleum
Dixie Oil Company
Dixon Oil Co.
Don Hardy
Donald Childs
Dow Chemical Company
Dr. Joe L. Griffith
Driver Construction Co.
Drummond Brothers, Inc.
Duffie Monroe & Sons Co., Inc.
ECI (A/K/A Energy Cooperative Inc.)
Earnest Dalton
Earth Resources Trading
Eastern Seaboard Petroleum, Inc.
Elmer Hammon
Elvin Knight
Empire Marketing, Inc.
Encorp.
Energy Cooperative, Inc.
Energy Distribution Co.
Englehard Corporation
Englehard Oil Corporation
Entex
Evans Oil Co.
Exxon Company
F & S Trading Company, Inc.
Farmers Union Central Exchange, Inc.
Farmland Industries Inc.
Fasgo, Inc.
Fedco Oil Company
Federal Employees Distributing Co.
Fitzpatrick Spreader
Flutz Oil Company
Flying J. Inc.
Foremost Petroleum
Four Corners Pipe Line
Frank Katz
Frank W. Abrahamsen
Frank's Butane, Inc.
Friendswood Refinery
Frontier Manor Collection
Fuel Oil Supply & Terminating, Inc.
G. C. Clark Company
GPC Marketing Company
Gary Refining Co.
Geer Tank Trucks, Inc.
Gene Clary
Gene McDonald
General Crude Oil Company
Geodynamics Oil & Gas Inc.
George Kennedy
George Smith Chevron
Gleason Oil Company
Glenn Company
Globe Oil Co.
Godfrey's Standard Service
Good Hope Industries, Inc.

Good Hope Refineries, Inc.
Granite Oil Company
Guam Oil & Refining Co., Inc.
Gulf States Oil & Refining Company
H. D. Adkinson
H. H. Dunson
H.S. & L, Inc.
HNG Oil Company
Harbor Petroleum, Inc.
Harbor Trading
Harmony Grove Mills, Inc.
Harry Rosser
Hast Oil, Inc.
Heet Gas Company
Henry Alva Mercer
Herndon Oil & Gas Company
Horizon Petroleum Company
Houston Oil & Minerals Products Co.
Houston Oil & Refining
Howell Corporation
Hurricane Trading Company, Inc.
Hydrocarbon Trading and Transport Co.
Inco Trading
Independent Refining Corp.
Independent Trading Corporation
Indiana Refining, Inc.
Intercontinental Petroleum Corp.
International Crude Corporation
International Petro
International Petroleum Trading, Inc.
International Processors
Isthmus Trading Corporation
J & M Transport
J. & J's Fast Stop
J. A. Rackerby Corporation
J. H. Baccus
J. H. Baccus & Co.
J. J. Williamson
J. M. Petroleum Corporation
JPK Industries
Jack W. Grigsby
Jaguar Petroleum, Inc.
James L. Bush
Jay Petroleum Company
Jay-Ed Petroleum Company
John W. McGowan
Kalama Chemical, Inc.
Kelly Trading Corp.
Kenco Refining
Kerr-McGee Corporation
Koch Fuel
Koch Industries, Inc.
Kocolene Oil
Kocolene Station
L & L Resources, Inc.
L.S. Parker
LaGloria Oil & Gas
LaJet, Inc.
Lamar Refining Co.
Langham Petroleum Corp.
Larry Roberts
Laurel Oil, Inc.
Lee Allen
Lincoln Land Sales Company
Listo Petroleum Inc.
Longview Refining Corp.

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Love's Standard
 Lucky Stores Inc.
 M.L. Morrow
 Magna Energy Corporation
 Magnolia Oil Company
 Mansfield Oil Co.
 Mapco Petroleum, Inc.
 Mapco, Inc.
 Marlon Trading Co.
 Marlex Oil & Refining, Inc.
 Marlin Petroleum, Inc.
 Martin Oil Company
 Mathew's Grocery
 McAuleep Oil Co.
 McAuley Oil Company
 Meadows Gathering, Inc.
 Mellon Energy Products Co.
 Merit Petroleum, Inc.
 Metro Wash, Inc.
 Miller Oil Purchasing Co.
 Minor Oil, Inc.
 Minro Oil, Inc.
 Mitchell Oil Co.
 Mitsui & Co. (USA) Inc.
 Mobil Bay Refining Company
 Montgomery Well Drilling
 Mundy Food Market
 Munford, Inc.
 Mutual Petroleum
 NRG Oil Company
 National Convenience Stores
 National Cooperative Refinery
 Nicholson Grocery and Gas
 North American Petroleum
 Northeast Petroleum Corp.
 Northeast Petroleum Corporation
 Northgate Auto Center
 Northwest Crude, Inc.
 Nova Refining Corp.
 Occidental Petroleum Corp. (includes
 Permian)
 Ocean Drilling and Exploration Co.
 Oil Exchange, Inc.
 Oilco
 Omega Petroleum Corp.
 Otoe Corporation
 Oxxo Energy Group, Inc.
 P & O Falco, Inc.
 P. L. Heatley Co.
 PEH, Inc.
 PIB, Inc.
 PSW Distributors Company
 Pacific Refinery, Inc.
 Pacific Resources, Inc.
 Pan American Products Corp.
 Par Brothers Food Store
 Pauley Petroleum Inc.
 Pennzoi Co.
 Permian Corporation (The)
 Pescar International Corp.
 Pescar International Trading Co.
 Petraco (U.S.A.) Inc.
 Petrade International
 Petrol Products, Inc.
 Phillips Petroleum Company
 Phoenix Petroleum Co.
 Phoenix Petroleum Co.
 Pine Mountains
 Poole Petroleum
 Port Petroleum
 Presley Oil Co.
 Procoil Inc.
 Publiker Industries, Inc.
 Pyramid Dist. Co., Inc.
 Questor Crude Oil Company
 Qultman Refining Co.
 R. H. Garrett Paving
 Ra-Gan Fuel, Inc.
 Reeder Distributing Co.
 Reeder Distributors
 Reese Exploration Co.
 Research Fuels Inc.
 Revere Petroleum Co.
 Richardson-Ayres, Inc.
 Robert Bishop
 Robert Patrick
 Roberts Grocery
 Rock Island Refining Corporation
 Rogers Oil Company
 Roy Baerne
 Russell Oil Company
 S. G. Coplen
 SECO (Scruggs Energy)
 Saber Crude Oil, Inc.
 Saber Refining Company
 Salem Ventures, Inc.
 Samson Resources Company
 Santa Fe Energy Products Co.
 Saye's Truck Stop
 Scandix Oil Limited
 Score, Inc.
 Scruggs Energy Company
 Scurlock Oil Company
 Scurry Oil Company
 Seamount Petroleum Company
 Seaview Petroleum Company
 Sector Refining, Inc.
 Seifton Miller
 Shepherd Trading Corporation
 Shulze Processing
 Sigmor Corporation
 Skelly Oil Company
 South Hampton Refining Company
 South Texas LP Gas Co.
 Southern Crude Oil Resources
 Southern Terminal & Transport, Ltd.
 Southern Union Company
 Southwest Petro. Energy
 Southwest Petrochem
 Standard Oil Co. (Ohio)
 Standard Oil Co. of California
 Standard Oil Company (Indiana)
 Standard Oil Company (Ohio)
 Sterling Energy Company
 Steve Childs
 Stix Gas Company, Inc.
 Sunset Grocery
 Sunset Oil & Refining, Inc.
 Swanee Petroleum Company
 T & P Enterprises
 T. B. Eley
 T. E. Jewell
 Tauber Oil Company

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Tenneco, Inc.
 Tesoro Crude Oil Company
 Texana Oil & Gas Corp.
 Texas American Petrochemicals (TAP)
 Texas City Refining
 Texas Eastern Transmission Corp.
 Texas Energy Reserve Corporation
 Texas Pacific Oil Company
 Thomas Cockvill
 Thomas Petroleum Products, Inc.
 Thorton Oil Company
 Thyssen Incorporated
 Tiger Petroleum Company
 Time Oil Co.
 Tipperary Refining Company
 Tom Banks
 Tom Smith
 Tomlinson Petroleum, Inc.
 Tosco Corporation
 Total Petroleum, Inc.
 Trans-Texas Petroleum Corp.
 Transco Trading Company
 Turboll Oil and Refining
 Two Rivers Oil & Gas Co., Inc.
 U-Fill 'er Up
 USA Gas, Inc.
 Uni Oil Company
 Union Oil of California
 Doram Energy
 United Petroleum Marketing
 United Refining Company
 United Refining, Inc.
 Universal Rundie
 Val-Cap, Inc.
 Vedetta Oil Trading, Inc.
 Vedette Oil Trading, Inc.
 Vickers Energy Corp.
 W. C. Colquitt
 W. T. Strickland
 W. W. Blanton
 W.A. Nunnally, Jr., Construction Co.
 W.D. Porterfield
 Wellven, Inc.
 West Texas Marketing Corp.
 Western Crude Oil, Inc.
 Western Fuels, Inc.
 Wight Nurseries of Oglethorpe Co.
 William Seabolt
 Wilson's Used Tractors
 Windsor Gas Corp.
 Wyoming Refining

APPENDIX B to 10 CFR 210.1—FIRMS WITH COMPLETED PAYMENTS SUBJECT TO DISTRIBUTION

The following firms have completed making restitutionary payments to DOE but their payments are still subject to distribution by DOE. Each such firm must maintain relevant records until June 30, 1985, unless this period is extended on a firm-by-firm basis. Relevant records are all records of the firm, including any affiliates, subsidiaries or predecessors in interest, for the time period covered by the judicial or administrative order, consent order, or other settlement or order requiring the payments, evidencing

sales volume data for each product subject to controls and customers' names and addresses.

Name of firm	Location
A. Tarricone Inc.	Yonkers, NY.
Adolph Coors Company	Golden, CO.
Allied Materials Corp & Excel	Oklahoma City, OK.
Aminco USA, Inc.	Houston, TX.
Amtel, Inc.	Providence, RI.
Apache Corporation	Minneapolis, MN.
APCO Oil Corporation	Oklahoma City, OK.
Arapaho Petroleum, Inc.	Breckenridge, TX.
Arkansas Louisiana Gas Company	Shreveport, LA.
Arkla Chemical Corporation	Shreveport, LA.
Armour Oil Company	San Diego, CA.
Associated Programs Inc.	Boca Raton, FL.
Atlanta Petroleum Production	Fort Worth, TX.
Automatic Heat, Inc.	
Ayers Oil Company	Canton, MD.
Aztex Energy Corporation	Knoxville, TN.
Bak Ltd.	Narberth, PA.
Bayou State Oil/IDA Gasoline	Shreveport, LA.
Bayside Fuel Oil Depot Corp.	Brooklyn, NY.
Bairidge Oil Company	Los Angeles, CA.
Blaylock Oil Co., Inc.	Homestead, FL.
Blex Oil Company	Minneapolis, MN.
Boswell Oil Company	Cincinnati, OH.
Box, Cloyce K.	Dallas, TX.
Breckenridge Gasoline Company	Kansas City, KS.
Brownlie, Wallace, Armstrong	Denver, CO.
Bucks Butane & Propane Service	San Jose, CA.
Budget Airport Associates	Los Angeles, CA.
Bucier Enterprises Inc.	Evansville, IN.
Butler Petroleum Corp.	Butler, PA.
C.K. Smith & Company, Inc.	Worcester, MA.
Cap Oil Company	Tulsa, OK.
Champlain Oil Co., Inc.	South Burlington, VT.
Chapman, H.A.	Tulsa, OK.
Cibro Gasoline Corporation	Bronx, NY.
City Service Inc.	Kalispell, MT.
Coastal Corporation	Houston, TX.
Coline Gasoline Corporation	Santa Fe Springs, CA.
Collins Oil Co.	Aurora, IL.
Columbia Oil Co.	Hamilton, OH.
Conlo Service Inc.	East Farmingdale, NY.
Conoco, Inc.	Houston, TX.
Consolidated Gas Supply Corp.	Hastings, WV.
Consolidated Leasing Corp.	Los Angeles, CA.
Consumers Oil Co.	Rosemead, CA.
Continental Resources Company	Winter Park, FL.
Cordele Operating Co.	Corliss, TX.
Cosby Oil Co., Inc.	Whittier, CA.
Cougar Oil Co.	Seima, AL.
Cross Oil Co., Inc.	Wellstone, MO.
Crystal Oil Company (formerly Valley Corp.)	Shreveport, LA.
Crystal Petroleum Co.	Corpus Christi, TX.
Devon Corporation	Oklahoma City, OK.
Dorchester Gas Corp.	Dallas, TX.
E.B. Lynn Oil Company	Allentown, PA.
E.M. Bailey Distributing Co.	Paducah, KY.
Eagle Petroleum Co.	Wichita Falls, TX.
Earls Broadmoor	Houma, LA.
Earth Resources Co.	Dallas, TX.
Eastern Petroleum Corp.	Annapolis, MD.
Edington Oil Co.	Los Angeles, CA.
Elias Oil Company	West Palm Beach, FL.
Elm City Filling Stations, Inc.	New Haven, CT.
Empire Oil Co.	Bloomington, CA.
Endicott, Eugene	Redmond, OR.

Name of firm	Location	Name of firm	Location
Enserch Corp.....	Dallas, TX.	Little America Refining Co.....	Salt Lake City, UT.
Enterprise Oil & Gas Company.....	Detroit, MI.	Lockheed Air Terminal Inc.....	Burbank, CA.
F.O. Fletcher, Inc.....	Tacoma, WA.	Lowe Oil Company.....	Clinton, MO.
Fagadeu Energy Corporation.....	Dallas, TX.	Lucia Lodge Arco.....	Big Sur, CA.
Farstad Oil Company.....	Minot, ND.	Luke Brothers Inc.....	Calera, OK.
Field Oil Co., Inc.....	Ogden, UT.	Lunday Thargard Oil.....	South Gate, CA.
Fine Petroleum Co., Inc.....	Norfolk, VA.	Malco Industries Inc.....	Cleveland, OH.
Foster Oil Co.....	Richmond, MI.	Mapco, Inc.....	Tulsa, OK.
Franks Petroleum Inc.....	Shreveport, LA.	Marine Petroleum Co.....	St. Louis, MO.
Froesel Oil Co.....		Marien L. Knutsen Dist. Inc.....	Stanwood, WA.
Gas Systems Inc.....	Ft. Worth, TX.	Martin Oil Service, Inc.....	Blue Island, IL.
Gate Petroleum Co., Inc.....	Jacksonville, FL.	Martinoil Company.....	Fresno, CA.
GCO Minerals Company.....	Houston, TX.	Marvel Fuel Oil and Gas Co.....	
Getty Oil Company.....	Los Angeles, CA.	McCarty Oil Co.....	Wapokoneta, OH.
Gibbs Industries, Inc.....	Revere, MA.	McCleary Oil Co., Inc.....	Chambersburg, OH.
Glaser Gas Inc.....	Calhoun, CO.	McClure's Service Station.....	Salisbury, PA.
Glover, Lawrence H.....	Patchogue, NY.	McTan Corporation.....	Abilene, TX.
Goodman Oil Company.....	Boise, ID.	Mesa Petroleum Company.....	Amarillo, TX.
Grant Rent a Car Corporation.....	Los Angeles, CA.	Midway Oil Co.....	Rock Island, IL.
Grimes Gasoline Co.....	Tulsa, OK.	Midwest Industrial Fuels, Inc.....	La Crosse, WI.
Gulf Energy & Development Corp. (also known as Gulf Energy De- velopment Corp.).....	San Antonio, TX.	Mississippi River Transmission.....	St. Louis, MO.
Gulf Oil Corp.....	Houston, TX.	Mitchell Energy Corp.....	Woodlands, TX.
Gull Industries, Inc.....	Seattle, WA.	Montana Power Co.....	Butte, MT.
H.C. Lewis Oil Co.....	Welch, WV.	Moore Terminal and Barge Co.....	Monroe, LA.
Hamilton Brothers Petroleum Co.....	Denver, CO.	Mountain Fuel Supply Company.....	Salt Lake City, UT.
Harris Enterprise Inc.....	Portland, OR.	Moyle Petroleum Co.....	Rapid City, SD.
Heller, Glenn Martin.....	Boston, MA.	Mustang Fuel Corporation.....	Oklahoma City, OK.
Hendel's Inc.....	Waterford, CT.	Naphsol Refining Company.....	Muskegon, MI.
Henry H. Gungoli Associates.....	Enid, OK.	National Helium Corporation.....	Liberal, KS.
Hertz Corporation, The.....	New York, NY.	National Propane Corp.....	Wyandanch, NY.
Hines Oil Co.....	Murphyboro, IL.	Navajo Refining Company.....	Dallas, TX.
Homer & Smith, A Partnership.....	Houston, TX.	Nielson Oil & Propane, Inc.....	West Point, NE.
Houston Natural Gas Corp.....	Houston, TX.	Northeast Petroleum Industries.....	Chelesea, MA.
Howell Corporation/Quintana Re- finery Co.....	Houston, TX.	Northeastern Oil Co., Inc.....	Gillette, WY.
Hunt Industries.....	Dallas, TX.	Northwest Pipeline Corp.....	Salt Lake City, UT.
Hunt Petroleum Corp.....	Dallas, TX.	O'Connell Oil Co.....	Pittsfield, MA.
Husky Oil Company of Delaware.....	Cody, WY.	Oceans Terminal Corp. et al.....	Bronx, NY.
Ideal Gas Co., Inc.....	Nyassa, OR.	OKC Corporation.....	Dallas, TX.
Independent Oil & Tire Company.....	Elyria, OH.	Olin Corporation.....	Stamford, CT.
Inland USA, Inc.....	St. Louis, MO.	Oneok Incorporation.....	Tyler, TX.
Inman Oil Co.....	Salem, MO.	Ozona Gas Processing Plant.....	Ormond Beach, FL.
Internorth, Inc.....	Omaha, NE.	Pacer Oil Co. of Florida, Inc.....	Seattle, WA.
J.E. DeWitt, Inc.....	South El Monte, CA.	Pacific Northern Oil.....	Houston, TX.
J.M. Huber Corp.....	Houston, TX.	Panhandle Eastern (Century).....	Shreveport, LA.
James Petroleum Corp.....	Bakersfield, CA.	Parade Company.....	Nashville, TN.
Jay Oil Company.....	Fort Smith, AR.	Parham Oil Corporation.....	Phoenix, AZ.
Jimmys Gas Stations Inc.....	Auburn, ME.	Pasco Petroleum Co., Inc.....	Silverdale, WA.
Jones Drilling Corporation.....	Duncan, OK.	Pennzoll Company.....	Houston, TX.
Juniper Petroleum Corporation.....	Denver, Co.	Perry Gas Processors, Inc.....	Odeessa, TX.
Kansas-Nebraska Natural Gas Co.....	Hastings, NE.	Peoples Energy Corp.....	Chicago, IL.
Keller Oil Company, Inc.....	Effingham, IL.	Parta Oil Marketing Corp.....	Beverly Hills, CA.
Kenny Larson Oil Co., Inc.....		Peterson Petroleum Inc.....	Hudson, NY.
Kent Oil & Trading Company.....	Houston, TX.	Petro-Lewis Corp.....	Denver, CO.
Key Oil Co., Inc.....	Tuscaloosa, AL.	Petrolane-Lomita Gasoline Co.....	Long Beach, CA.
Key Oil Company.....	Bowling Green, KY.	Petroleum Heat & Power Co. Inc.....	Stamford, CT.
Kiesel Co.....	St. Louis, MO.	Petroleum Sales/Services Inc.....	Buffalo, NY.
King & King Enterprise.....	Kansas City, MO.	Pioneer Corp.....	Amarillo, TX.
Kingston Oil Supply Corp.....	Port Ewen, NY.	Planet Engineers Inc.....	Denver, CO.
Kirby Oil Company.....		Plateau, Inc.....	Albuquerque, NM.
L & L Oil Co., Inc.....	Belle Chasse, LA.	Plaquemines Oil Sales.....	Belle Chasse, LA.
L.P. Rech Distributing Co.....	Roundup, MT.	Point Landing Inc.....	Hanrahan, LA.
La Gloria Oil and Gas Co.....	Houston, TX.	Port Oil Company, Inc.....	Mobile, AL.
Lakes Gas Co., Inc.....	Forest Lake, MN.	Post Petroleum Co.....	West Sacramento, CA.
Lakeside Refining Co./Crystal.....	Southfield, MI.	Power Pak Co., Inc.....	Houston, TX.
Landsee Oil Company.....	Irvine, CA.	Pride Refining, Inc.....	Abilene, TX.
Leathers Oil Co., Inc.....	Portland, OR.	Pronto Gas Co.....	Abilene, TX.
Leese Oil Company.....	Pocatello, ID.	Propane Gas & Appliance Co.....	New Brockton, AL.
Leonard E. Belcher, Inc.....	Springfield, MA.	Prosper Energy Corporation.....	Dallas, TX.
Lincoln Land Oil Co.....	Springfield, IL.	Pyro Energy Corporation.....	Evansville, ID.
Liquid Products Recovery.....	Houston, TX.	Pyrofax Gas Corporation.....	Houston, TX.
		Quaker State Oil.....	Oil City, PA.
		Quarles Petroleum, Inc.....	Fredericksburg, VA.

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Name of firm	Location
Resources Extraction Process.....	Houston, TX.
Reynolds Oil Co.....	Kreming, CO.
Richardson Ayers Jobbers, Inc.....	Alexandria, LA.
Riverside Oil, Inc.....	Evansville, IL.
Roberts Oil Co. Inc.....	Albuquerque, NM.
Rookwood Oil Terminals Inc.....	Cincinnati, OH.
Saber Energy, Inc.....	Houston, TX.
Sanesco Oil Co.....	Escondido, CA.
Schroeder Oil Company.....	Carroll, IA.
Seminole Refining Inc.....	St. Marks, FL.
Sid Richardson Carbon & Gas.....	Ft. Worth, TX.
Sigmore Corporation.....	San Antonio, TX.
Southwestern Refining Co., Inc.....	Salt Lake City, UT.
Speedway Petroleum Co., Inc.....	Fitchburg, MA.
St. James Resources Corp.....	Boston, MA.
Standard Oil Co. (Indiana).....	Chicago, IL.
Stinnes Inter Oil Inc.....	New York, NY.
Tenneco Oil Company.....	Houston, TX.
Texas/Arkansas/Colorado/ Oklahoma/Oil Purchasing.....	Dallas, TX.
Texas Gas & Exploration.....	Dallas, TX.
Texas Oil & Gas Corporation.....	Dallas, TX.
Texas Pacific Oil Company, Inc.....	Casper, WY.
The True Companies.....	Purcellville, VA.
Thompson Oil Inc.....	Yakima, WA.
Tiger Oil Co.....	Seattle, WA.
Time Oil Company.....	Midland, TX.
Tipperary Corp.....	Richmond, MO.
Tippins Oil & Gas Co.....	Dallas, TX.
Triton Oil & Gas Corp.....	King of Prussia, PA.
U.S. Compressed Gas Company.....	Combined Locks, WI.
U.S. Oil Company.....	Santa Monica, CA.
U.S.A. Petroleum, Inc.....	Houston, TX.
Union Texas Petroleum Corp.....	Hillside, NJ.
United Oil Company.....	Mineral Wells, TX.
Upham Oil & Gas Co.....	Fresno, CA.
Vangas Inc.....	Jackson, MS.
VGS Corporation.....	Towson, MD.
Waller Petroleum Company, Inc.....	Providence, RI.
Warren Holding Company.....	Tuscaloosa, AL.
Warrior Asphalt Co. of Alabama.....	Smyma, CA.
Webco Southern Oil Inc.....	Jersey City, NJ.
Wellen Oil Co.....	
Wiesehan Oil Co.....	Erie, PA.
Willis Distributing Company.....	Fort Worth, TX.
Winston Refining Company.....	New York, NY.
Witco Chemical Corporation.....	Los Angeles, CA.
World Oil Company.....	Denver, CO.
Worldwide Energy Corp.....	Douglasville, GA.
Young Refining Corporation.....	Hobbs, NM.
Zia Fuels (G.G.C. Corp.).....	

(Approved by the Office of Management and Budget under control number 1903-0073)

[50 FR 4962, Feb. 5, 1985]

Subparts B—C—[Reserved]

Subpart D—General Rules

§ 210.61 Retaliatory actions.

No firm (including an individual) may take retaliatory action against any other firm (including an individual) that files or manifests an intent to file a complaint of alleged violation

of, or that otherwise exercises any rights conferred by the Act, any provision of this part, or any order issued under this chapter. For the purposes of this paragraph, "retaliatory action" means any action contrary to the purpose or intent of the Economic Stabilization Program or the Department of Energy and may include a refusal to continue or sell or lease, any reduction in quality, any reduction in quantity of services or products customarily available for sale or lease, any violation of privacy, any form of harassment, or any inducement of others to retaliate.

[39 FR 35509, Oct. 1, 1974]

PART 211—MANDATORY PETROLEUM ALLOCATION REGULATIONS

211.66 Reporting requirements.

211.67 Allocation of domestic crude oil.

211.69 Entitlements adjustment mechanism.

APPENDIX A—STANDBY REGULATIONS

EDITORIAL NOTE: Regulations in this part are affected by a document published at 44 FR 37938, June 29, 1979. See the redesignation table appearing in the Finding Aids section of this volume.

§ 211.66 Reporting requirements.

(a)—(h) [Reserved]

(i) *Monthly transaction report.* On or prior to the tenth day of each month, commencing with the month of February 1975, each refiner and eligible firm that was required to purchase or sell entitlements for the third month prior to the month in which the report is filed shall file with the DOE a report certifying its purchases or sales of entitlements for that prior month.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

§ 211.67

10 CFR Ch. II (1-1-86 Edition)

[39 FR 42247, Dec. 4, 1974, as amended at 40 FR 10445, Mar. 6, 1975; 46 FR 20512, and 20520, Apr. 3, 1981]

NOTE: The provisions of this section may be affected by Standby Regulation 211-1. Standby Regulation 211-1 appears in Appendix A to Part 211. For the convenience of the user, a table listing all Standby Regulations and sections affected appears in the Finding Aids section of this volume.

§ 211.67 Allocation of domestic crude oil.

(a) *Issuance of entitlements.* (1) For each month, commencing with the month of June 1978, each refiner shall be issued a number of entitlements by the ERA equal to the number of barrels of crude oil included in the total volume of that refiner's crude oil runs to stills for that month multiplied by the national domestic crude oil supply ratio for that month, subject to the entitlement adjustment for small refiners set forth in paragraph (e) of this section and the entitlement adjustments in paragraph (a)(4) of this section.

(2) Refiners to which entitlements shall be issued under this section shall include all refiners classified as refiner-buyers or refiner-sellers as of December 1, 1974 for purposes of § 211.65. Any refiner that is not so classified, or the refinery capacity of which is not certified by the DOE for purposes of § 211.65, shall apply to the DOE for certification of its refinery capacity for purposes of qualifying to receive entitlements under this section. With respect to the granting of any such application for certification, the DOE shall consider the factors set forth in § 211.65(b)(1)(v) and (vi).

(3) For each month in the period July 1, 1979 through September 30, 1981, each eligible firm that has imported an eligible product in that month shall be issued a number of entitlements equivalent to fifty percent (50%) of the number of entitlements that would be received by a refiner (without giving effect to the provisions of § 211.67(e)) in that month with respect to inclusion of a number of barrels of crude oil in that refiner's crude oil runs to stills equal to a number of barrels of that eligible product imported by that eligible firm. An eligible product is imported for purposes of this paragraph (a)(3) in

the month, as specified on Customs Forms 7501 and 7505, as appropriate, in which importation takes place.

(4) For each month, commencing with the month of June 1978, the number of entitlements issued under paragraph (a) (1) of this section to each refiner shall be increased by: (i) The number of barrels of California lower tier crude oil included in its adjusted crude oil receipts in that month multiplied by a fraction, the numerator of which is \$2.38 plus or minus \$.09 for each degree API gravity (or fraction thereof) by which the weighted average gravity of all California lower tier crude oil included in that refiner's adjusted crude oil receipts in that month either falls below or exceeds, respectively, 18 degrees API, and the denominator of which is the entitlement price for that month; and (ii) the number of barrels of California upper tier crude oil included in its adjusted crude oil receipts in that month multiplied by a fraction, the numerator of which is \$1.45 plus or minus \$.09 for each degree API gravity (or fraction thereof) by which the weight average gravity of all California upper tier crude oil included in that refiner's adjusted crude oil receipts in that month either falls below or exceeds, respectively, 18 degrees API, and the denominator of which is the entitlement price for that month: *Provided*, That the dollar value of additional entitlements issued under this paragraph (a)(4) shall not exceed the dollar value of the obligation (as calculated under paragraph (b) of this section) for the crude oil with respect to which such additional entitlements are issued. The refiner shall calculate and report the weighted average gravity of California lower tier crude oil and California upper tier crude oil separately, and in calculating such weighted average gravities shall (A) determine the gravity of such crude oil for each receipt of such crude oil in that month on the basis of the gravity of such crude oil at the time it becomes a receipt, and (B) determine a single monthly weighted average gravity for such crude oil by weight averaging (on a volumetric basis) all of such individual receipts in that month.

(5) (i) For each month, entitlements shall be issued with respects to a petroleum substitute as follows:

(A) In the case of a shale oil used as a feedstock or fuel in a domestic refinery, the refiner shall be issued, upon certification prior to January 28, 1981, to ERA that the shale oil has been used as a feedstock or fuel in a domestic refinery, that number of entitlements that would be received by the refiner if each barrel of the shale oil were a barrel of crude oil.

(B) In the case of a shale oil used or sold for use domestically as fuel other than in a refinery, the producer of the shale oil shall be issued, upon certification prior to January 28, 1981, to ERA that the shale oil has been used or sold for use domestically as fuel other than in a refinery, that number of entitlements that would be received by a refiner if each barrel of the shale oil were a barrel of crude oil.

(C) In the case of ethyl alcohol derived from domestic biomass and mixed with gasoline, the producer of the ethyl alcohol shall be issued that number of entitlements that would be received by a refiner if a barrel of ethyl alcohol were equal to 0.6189 barrels of crude oil; *Provided, that* entitlements will be issuable to a producer of ethyl alcohol only upon written certification prior to January 28, 1981, by the producer to ERA that

(1) The producer has actually mixed the ethyl alcohol with gasoline and used the resulting mixture domestically as fuel or sold the mixture for domestic use as fuel; or

(2), In any case where the producer sells the ethyl alcohol prior to mixing with gasoline, the producer has received written certification from a subsequent purchaser that such person

(i) Has been the first person to actually mix the ethyl alcohol with gasoline;

(ii) Has used the resulting mixture domestically as fuel or sold the mixture for domestic use as fuel;

(iii) Has based certification as to such use or sale upon documentation; and

(iv) Will maintain such documentation in a manner so as to be available for inspection at any time by the ERA within five years.

(D) In the case of municipal solid waste, the person who first processes the municipal solid waste to produce a solid fuel shall be issued that number of entitlements that would be received by a refiner if each ton of municipal solid waste processed were equal to 1.40 barrels of crude oil; *Provided, that* entitlements will be issuable to the processor of the municipal solid waste only upon written certification prior to January 28, 1981, by the processor to ERA that the processor has (1) actually used the solid waste or solid derivative thereof domestically to produce useful energy and that the energy thus produced has actually been used as fuel; or (2) sold the solid waste or solid derivative thereof or useful energy produced from either the solid waste or its derivative for domestic use as fuel.

(E) In the case of methane derived from municipal sewage or domestic landfills, the collector of the methane shall be issued, upon certification prior to January 28, 1981, to ERA that the methane has been used or sold for use domestically as fuel, that number of entitlements that would be received by a refiner if each unit of methane having a gross heating value of 5.7 million BTU's were a barrel of crude oil.

(F) In the case of solid waste or a solid or gaseous derivative thereof which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of this chapter before January 28, 1981, that person designated by ERA as eligible to participate in the entitlements program with respect to such petroleum substitute shall be issued that number of entitlements that would be received by a refiner if the unit of measurement established by ERA for that petroleum substitute were a barrel of crude oil.

(G) In the case of a liquid petroleum substitute which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of this chapter before January 28, 1981, and which has a gross heating value of 5.7 million or more BTU's per barrel, that person designated by ERA as eligible to participate in the entitlements program with respect to the petroleum substitute shall be issued that number

of entitlements that would be received by a refiner if a barrel of the petroleum substitute were a barrel of crude oil.

(H) In the case of a liquid petroleum substitute which has been designated as a petroleum substitute by ERA in an order issued pursuant to § 205.95 of this chapter before January 28, 1981, and which has a gross heating value of less than 5.7 million BTU's per barrel, that person designated by ERA as eligible to participate in the entitlements program with respect to the petroleum substitute shall be issued that number of entitlements that would be received by a refiner if a barrel of the petroleum substitute were equal to a fraction of a barrel of crude oil, the numerator of which would be the gross heating value in BTU's per barrel of the petroleum substitute, and the denominator of which would be 5.7 million BTU's. An order issued by ERA to designate a petroleum substitute shall also designate the firm to which entitlements will be issued and the manner in which the use of the petroleum substitute by that firm shall result in entitlement issuances.

(i) Each firm shall in its initial report to ERA for purposes of receiving entitlements pursuant to the provisions of paragraph (a)(5)(i) of this section submit written certification that all local, state, or federal permits or licenses required with respect to the production, distribution or any other use of the petroleum substitute have been obtained and provide copies of such permits and licenses and, as required by ERA, any information submitted to a governmental body for the purpose of obtaining any applicable permit or license. Each such firm shall in its initial report and each month thereafter submit any information required by ERA to be submitted by such firm on forms adopted by ERA for purposes of determining the entitlements issuable to such firm. A firm shall provide written certification in any submission that the information set forth therein is accurate and based upon documentation, and, further, that such firm will maintain such records in a manner so as to be available for inspection at any time by the ERA within five years. Records re-

quired to be kept under this subparagraph shall be made available for inspection at any time upon the request of a representative of ERA.

(6)(i) For each month in the period May 1, 1979 through October 31, 1979, each firm that imports "distillate fuel oil, less No. 4" and "kerosene" as those terms are defined in the instructions to ERA Form ERA-60, that is the importer of record under a license issued pursuant to Part 213 of this chapter, and that owns the product at the time of importation thereof pursuant to that license shall be issued a number of entitlements equal to the number of barrels of distillate fuel oil, less No. 4, and kerosene imported in that month by that firm multiplied by a fraction, the numerator of which is \$5, and the denominator of which is the entitlement price for that month.

(ii) For purposes of paragraph (a)(6), the time of importation shall be the earliest of the following dates as specified on the Customs Form 7501 or 7505: (A) The "release date"; (B) the "entry date"; (C) the "validation date"; (D) the "PAID stamp date"; (E) the "date of importation"; or (F) the "withdrawal date."

(7)(i) For each month commencing with the month of August 1980, the United States Government shall be issued entitlements for crude oil purchased for, delivered to, and accepted for delivery to the Strategic Petroleum Reserve in the following month. The number of entitlements issued shall be calculated in accordance with the provisions of paragraphs (a)(7)(iii) through (vi) of this section.

(ii) In any case where the United States Government acquires from a refiner or other firm crude oil for storage in the Strategic Petroleum Reserve pursuant to an exchange or matching purchase and sale transaction, no domestic crude oil shall be deemed to have been transferred by that refiner or other firm in that exchange or transaction and such volume of domestic crude oil deemed to have been retained shall be included in a refiner's crude oil receipts in the month in which such domestic crude oil is delivered to and accepted for delivery to the Strategic Petroleum Reserve, and the United States

Government shall be issued entitlements for the month prior to the month in which such domestic crude oil is delivered to and accepted for delivery to the Strategic Petroleum Reserve. The number of entitlements issued shall be calculated in accordance with the provisions of paragraphs (a)(7)(iii) through (vi) of this section on the basis of the volume of crude oil given up by the Government in any such exchange or transaction. Notwithstanding anything to the contrary in 10 CFR Part 212, in any matching purchase and sale transaction subject to this paragraph, the United States Government may pay and the seller may receive any price for the crude oil purchased by the United States Government for the Strategic Petroleum Reserve.

(iii) One entitlement shall be issued for each barrel of imported crude oil and each barrel of domestic crude oil the first sale of which is not subject to the ceiling price limitations of Subpart C of Part 212 of this chapter.

(iv) A fraction of an entitlement shall be issued for each barrel of upper tier crude oil other than ANS upper tier crude oil, the numerator of which is the difference between the reported weighted average cost per barrel to refiners of upper tier crude oil other than ANS upper tier crude oil and the reported weighted average cost per barrel to refiners of lower tier crude oil, and the denominator of which is the entitlement price.

(v) A fraction of an entitlement shall be issued for each barrel of ANS upper tier crude oil, the numerator of which is the difference between the reported weighted average cost per barrel to refiners of ANS upper tier crude oil and the reported weighted average cost per barrel to refiners of lower tier crude oil, and the denominator of which is the entitlement price.

(vi) The calculations in paragraphs (a)(7)(iv) and (a)(7)(v) of this section shall be based on the entitlement price fixed for, and the weighted average costs reported for, the month prior to the month in which the crude oil is delivered to the Strategic Petroleum Reserve.

(b) *Required purchase of entitlements by refiners.* (1) For each month,

commencing with the month of February 1976, each refiner that has been issued fewer entitlements for that month than the number of barrels of deemed old oil (as calculated under paragraph (b)(2) of this section) included in its adjusted crude oil receipts shall purchase a number of entitlements effective for that month equal to the difference between the number of barrels of deemed old oil (as so calculated) included in that refiner's adjusted crude oil receipts for that month and the number of entitlements issued to and retained by that refiner. Entitlement purchases required under this paragraph (b) of this section with respect to a particular month shall be effected by the close of the second month following that month.

(2) To calculate the number of barrels of deemed old oil included in a refiner's adjusted crude oil receipts for purposes of the definition of national domestic crude oil supply ratio in § 211.62, paragraph (b)(1) of this section, and paragraph (c) of this section shall be calculated as follows:

(i) Each barrel of old oil shall be equal to one barrel of deemed old oil;

(ii) Each barrel of upper tier crude oil (except ANS upper tier crude oil) shall constitute that fraction of a barrel of deemed old oil, the numerator of which is equal to the reported weighted average cost per barrel to refiners of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), heavy crude oil (as determined pursuant to § 212.59), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter for that month, less such weighted average cost per barrel to refiners of upper tier crude oil (except ANS upper tier crude oil), and the denominator of which is the entitlement price for that month;

(iii) Each barrel of ANS upper tier crude oil shall constitute that fraction

of a barrel of deemed old oil the numerator of which is equal to the reported weighted average cost per barrel to refiners of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), heavy crude oil (as determined pursuant to § 212.59), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter for that month, less such weighted average cost per barrel to refiners of ANS upper tier crude oil, and the denominator of which is the entitlement price for that month.

(c) *Required sale of excess entitlements.* For each month, commencing with the month of February 1976, each refiner that has been issued a greater number of entitlements for that month than the number of barrels of deemed old oil (as calculated under paragraph (b)(2) of this section) included in its adjusted crude oil receipts shall sell such excess entitlements, and the United States Government and any eligible firm (other than a refiner) that has been issued entitlements shall sell such entitlements.

(d) *Adjustments to volume of crude oil runs to stills.* (1) A refiner's volume of crude oil runs to stills shall (i) include (A) the volume of crude oil processed by another refiner for that refiner pursuant to a processing agreement and (B) the volume of crude oil processed by that refiner for a person other than a refiner pursuant to a processing agreement, and (ii) exclude the volume of crude oil processed by that refiner for another refiner pursuant to a processing agreement.

(2) The volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall be reduced by that refiner's volume of export sales under § 212.53 of this chapter in that month of refined petroleum products (including aviation

fuels as defined in § 211.142 of this part, but excluding refined lubricating oils) and residual fuel oil, including sales to a domestic purchaser which certifies the product is for export; *provided*, however, that the volume of a refiner's crude oil runs to stills for a month shall not be reduced by that refiner's volume of export sales of Bunker C and Navy Special fuel oils and No. 4 diesel, which are sold for use as a marine fuel on a voyage departing from a United States port.

(3) The volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall include the total number of barrels of plant condensate and the total number of barrels of synthetic crude oil made from tar sands which are imported from Canada and are utilized in that month as inputs to distillation units by a refiner, measured in accordance with the Bureau of Mines Form 6-1300-M. Neither plant condensate nor synthetic crude oil made from tar sands which are imported from Canada shall be eligible for inclusion in the volume of a refiner's crude oil runs to stills under this paragraph (a)(3) of this section unless payment has been made in accordance with Presidential Proclamation No. 3279, as amended, of any import license fees applicable to crude oil as defined for purposes of this section, which is imported for refining.

(4) For the period July 1, 1979 through September 30, 1981, for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio (but not for purposes of paragraph (e) of this section), the volume of crude oil runs to stills of any domestic refiner attributable to production of residual fuel oil transported in foreign flag tankers for sale (whether directly for consumption or for resale) or use in the eligible market (as defined in § 211.62) shall be reduced by fifty percent (50%). Any export sales of residual fuel oil giving rise to a deduction under paragraph (d)(2) of this section shall not be considered as residual fuel oil production

for purposes of this paragraph (d)(4) of this section.

(5)(i) The volume of a refiner's crude oil runs to stills beginning with the month of January, 1981 in a particular month for purposes of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio shall include the number of barrels of naphthas which are imported into Puerto Rico (other than imports from the U.S. Virgin Islands and other than naphthas imported into Puerto Rico which are acquired pursuant to an exchange or similar matching purchase and sale transaction for naphthas produced by a refinery located in the United States) and are utilized in that month as a petrochemical feedstock at a petrochemical plant owned or operated by that refiner in Puerto Rico, as reduced in paragraph (d)(5)(ii) of this section. The number of eligible barrels of naphthas for a particular month further shall be multiplied by a fraction the numerator of which is equal to the weighted average per barrel cost of all naphthas imported into Puerto Rico for that month as to which entitlement issuances are sought less the imputed per barrel cost of domestically produced naphthas for that month, and the denominator of which is the entitlement value for a barrel of crude oil included in the volume of a refiner's crude oil runs to stills for that month. For purposes of this paragraph (d)(5)(i) of this section, the imputed per barrel cost of domestically produced naphthas for a particular month, commencing with January, 1981 shall be equal to 117 percent of the weighted average per barrel cost of all the crude oil receipts for all domestic refiners for that month.

(ii) The volume of naphthas eligible for inclusion in the volume of a refiner's crude oil runs to stills in a particular month under paragraph (d)(5)(i) of this section shall be reduced by the volume of export sales (under § 212.53 of this chapter, including sales to a purchaser which certifies it or an entity affiliated with that purchaser will export the product so purchased), for that month of products produced

at the petrochemical plant that has processed the imported naphthas.

(iii) Notwithstanding any other provisions of this section, a firm other than a refiner that owns a petrochemical plant in Puerto Rico shall be eligible to receive entitlements with respect to naphthas processed at such a plant on the same basis as is provided for refiners in paragraphs (d)(5) (i) and (ii) of this section, except that such a firm shall not be eligible for any additional entitlements under the provisions of paragraph (e) of this section. Any such firm shall file reports under § 211.66 on the same basis as a refiner.

(iv) Any firm that is eligible for entitlement issuances under this subparagraph shall obtain appropriate certifications from any other firm to which it sells products produced at a petrochemical plant located in Puerto Rico. Such certification shall set forth whether or to what extent the products so purchased will be sold (whether directly by that other firm or indirectly through any firm affiliated with that other firm) in transactions that constitute export sales under § 212.53 of this chapter. Any firm purchasing products produced at a petrochemical plant located in Puerto Rico shall, upon the request of the owner or operator of that facility, certify to that owner or operator as to whether or what extent the further sale of those products by that firm (or any affiliate thereof) will constitute export sales under § 212.53.

(6)–(7) [Reserved]

(8) Commencing with the month of July 1978, the volume of a refiner's crude oil runs to stills in a particular month for purposes of the calculations in paragraph (a) (1) of this section and the calculations for the national domestic crude oil supply ratio shall include the total number of barrels of the liquid produced from oil shale that is found in the United States and used as a refining feedstock, blending feedstock or fuel in a domestic refinery in that month by a refiner.

(9) Commencing with the month of January 1979, the volume of crude oil runs to stills of a refiner in a particular month as to any of its refineries located in the State of Alaska, for pur-

poses of the calculations in paragraph (a)(1) of this section and the calculations for the national domestic crude oil supply ratio, shall not include the number of barrels of unfinished oils or partially-refined petroleum products injected or reinjected by that refinery into the Trans-Alaska Pipeline System in that month.

(e) *Small refiner bias.* (1) In addition to the number of entitlements issuable under paragraph (a) of this section, subject to the limitations set forth in paragraphs (e) (2), (3), and (4) of this section, effective for refiners' volumes of crude oil runs to stills for June 1979, each small refiner shall be issued the following number of additional entitlements for each day of a particular month:

(i) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 0 to 10,000 barrels in that month, each such refinery shall receive a number of entitlements equal to the number of barrels of such refinery's daily average volume of crude oil runs to stills for that month multiplied by a fraction, the numerator of which is \$.96, and the denominator of which is the entitlement price for that month;

(ii) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 10,000 to 30,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is \$9,600 plus \$.315 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 10,000 barrels for that month, and the denominator of which is the entitlement price for that month;

(iii) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 30,000 to 50,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is \$15,900 minus \$.095 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 30,000 barrels for that month, and the denominator of which is the entitlement price for that month;

(iv) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 50,000 to 100,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is \$14,000 minus \$.10 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 50,000 barrels for that month, and the denominator of which is the entitlement price for that month;

(v) For each small refiner with respect to its refineries with a daily average volume of crude oil runs to stills of 100,000 to 175,000 barrels in that month, each such refinery shall receive a number of entitlements equal to a fraction, the numerator of which is \$9,000 minus \$.12 for each barrel by which such refinery's daily average volume of crude oil runs to stills exceeds 100,000 barrels for that month, and the denominator of which is the entitlement price for that month.

(2) Effective for refiners' volumes of crude oil runs to stills for June 1977, no entitlements shall be issuable under paragraph (e)(1) of this section with respect to any volume of a small refiner's crude oil runs to stills attributable to a processing agreement for the account of that small refiner with another refiner.

(3) Each small refiner shall separately identify in its reports filed pursuant to § 211.66(h) of this subpart any volumes of its crude oil runs to stills not eligible (under the provisions of paragraph (e)(2) of this section) for small refiner bias entitlements.

(4) For purposes of the calculations in paragraph (e)(1) of this section, the daily average volume of a particular small refinery's crude oil runs to stills shall be computed as follows: The daily average volume of a small refiner's crude oil runs to stills (with respect to all of its refineries) shall be multiplied by a fraction, the numerator of which is the capacity of that particular small refinery as certified pursuant to paragraph (a)(2) of this section, and the denominator of which is the capacity of that small refiner (with respect to all of its refineries) as certified pursuant to paragraph (a)(2) of this section.

(f) *Transactions under § 211.65.* (1) Effective for sales for the allocation quarter commencing March 1, 1976 under § 211.65 of this subpart, no sale by a refiner-seller under § 211.65 shall be deemed for purposes of this section to include any volume of domestic crude oil. If a refiner-seller sells actual volumes of domestic crude oil under § 211.65, the related volumes of old oil and upper tier crude oil shall be included in that refiner-seller's crude oil receipts in the month in which the sale is made. For purposes of the adjustments set forth in paragraph (a)(4) of this section, a refiner-buyer's receipts of imported crude oil and Alaska North Slope crude oil shall include volumes of crude oil shall include volumes of crude oil sold under § 211.65 to that refiner-buyer.

(2) For sales for allocation quarters prior to the allocation quarter commencing March 1, 1976, each sale by a refiner-seller under § 211.65 shall be deemed to include volumes of old oil (and upper tier crude oil, if any) proportionate to the volumes thereof included in the deliveries of crude oil to that refiner-seller that determine the price at which the sale is made under § 212.94 of Part 212. Any volumes of domestic crude oil so deemed to be included in any sale under § 211.65 shall be reflected in the crude oil receipts of the refiner-buyer concerned. As to each sale for any such prior allocation quarter, each refiner-seller shall certify to the refiner-buyer the volume of old oil (and upper tier crude oil, if any) included in the volume of crude oil sold within twenty-eight (28) days following the month in which the crude oil is delivered to or for the account of the refiner-buyer in accordance with the provisions of § 212.131 of Part 212.

(3) In determining the weighted average landed cost of crude oil delivered to a refiner-seller in a month pursuant to § 212.94 of Part 212, the cost of any required purchases or revenues from any sales of entitlements by that refiner-seller shall not be taken into account.

(g) *Exchanges of crude oil.* (1) Subject to the provisions of paragraph (g)(3) of this section, in any exchange of crude oil in which only quality and

location differentials are given effect in the calculation of the exchange ratio, or in any matching purchase and sale transaction which has the same effect as such an exchange, no volumes of domestic crude oil shall be deemed to have been transferred. Any volumes of domestic crude oil exchanged away or sold pursuant to any such exchange or matching purchase and sale transaction shall be considered as having been retained by the refiner or other firm that has so exchanged away or sold such volumes, regardless of the volume of crude oil received or purchased by that refiner or other firm in such exchange or transaction.

(2) Subject to the provisions of paragraph (g)(3) of this section, volumes of domestic crude oil deemed to be retained by a refiner under the provisions of paragraph (g)(1) of this section shall be (i) included in that refiner's crude oil receipts at the time the crude oil acquired pursuant to the related exchange or purchase and sale transaction constitutes a crude oil receipt under § 211.62 of this subpart to that refiner, or (ii) certified as old oil, upper tier crude oil, ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), heavy crude oil (as determined pursuant to § 212.59), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), newly discovered crude oil (as determined pursuant to § 212.79) market level new crude oil (as determined pursuant to § 212.74), or any other domestic crude oil the first sale of which is exempt from Part 212 of this chapter, as the case may be, under the provisions of § 212.131 of Part 212 when the crude oil acquired pursuant to the related exchange or purchase and sale transactions is sold to another firm.

(3) Where a refiner exchanges away or sells volumes of domestic crude oil in an exchange or matching purchase and sale transaction of the type described in paragraph (g)(1) of this section and receives in exchange or purchases in the transaction foreign crude oil that is delivered and processed outside the United States, that refiner shall include any domestic crude oil so

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exchanged away or sold by it in its crude oil receipts as of the date that domestic crude oil is so exchanged away or sold.

(4) The provisions of paragraph (g)(1) of this section shall not apply to transactions involving domestic crude oil which is exchanged away by a firm other than a refiner for foreign crude oil that is not processed in a refinery located in the United States. Any firm other than a refiner that has exchanged away or sold domestic crude oil within the United States pursuant to an exchange transaction in which other crude oil is also transferred outside the United States shall comply with the certification requirements of § 212.131 of Part 212 as to any volumes of old oil or upper tier crude oil, as the case may be, so exchanged away or sold. Any domestic crude oil delivered to a refiner in the United States pursuant to a transaction of the type described in this paragraph (g)(4) shall be included in the crude oil receipts of the refiner that receives, directly or indirectly through further sales or exchanges, the volumes of domestic crude oil that are the subject of the transaction, as provided in § 211.62 of this subpart.

(5) For purposes of this paragraph (g), "refiner" means any firm that owns, operates or controls the operations of one or more refineries, and includes any entity that is a part of or affiliated with, or that controls or is controlled by (whether directly or indirectly), a refiner.

(h) *Averaging of crude oil receipts.* Upon application by a refiner in accordance with the procedures established under Subpart G of Part 205 of this chapter within thirty (30) days following the close of a month, the DOE may adjust the crude oil receipts of that refiner for that month to permit the portion of such crude oil receipts specified by the DOE to be included in the crude oil receipts of that refiner for one or more subsequent months, if the volume of crude oil receipts in that month is significantly disproportionate to the volume of that refiner's crude oil runs to stills for that month due to a shutdown (by reason of either a mechanical failure or normal maintenance procedures) re-

sulting in a fifty (50) percent or greater portion of that refiner's refinery capacity not having been operable for the duration of that month.

(i) *Issuance and transfer of entitlements.* (1) The DOE shall issue entitlements for each month (effective for the month of February 1976 and subsequent months) pursuant to a notice issued on the fifteenth day of the second month following that month.

(2) Each notice published by the DOE evidencing the issuance of entitlements under this section shall specify as to a particular month the national domestic crude oil supply ratio, the name of each refiner and other eligible firm to which entitlements have been issued, the number of barrels of deemed old oil included in each refiner's adjusted crude oil receipts, the number of entitlements issued to each such refiner or other firm, the number of entitlements required to be purchased or sold by each such refiner or other firm, and the price at which entitlements shall be purchased and sold.

(3) No transfer of an entitlement shall be effective if made to any firm that is not purchasing such entitlement to fulfill such firm's obligations under this section.

(4) The price at which entitlements shall be sold and purchased shall be fixed by the ERA for each month and shall be the exact differential between the weighted average cost per barrel to refiners of old oil and such weighted average cost of imported crude oil, stripper well crude oil (as defined in Part 212 of this chapter), heavy crude oil (as determined pursuant to § 212.59), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), newly discovered crude oil (as determined pursuant to § 212.79), market level new crude oil (as determined pursuant to § 212.74), and other domestic crude oils the first sale of which is exempt from the provisions of Part 212 of this chapter, such costs to be equivalent to the delivered costs to the refinery.

(j) *Reporting errors.* (1) Refiners and eligible firms shall correct any errors contained in reports filed pursuant to

§ 211.66 by filing an amended report for the particular month. Based on any reporting errors so corrected, the DOE in its discretion may adjust entitlement issuances to the refiner or eligible firm in one or more months subsequent to the month in which the amended report is filed with the DOE, by issuing fewer entitlements than the number otherwise issuable, by requiring the refiner or eligible firm to purchase entitlements in order to correct for excess entitlements issued in a prior month or by issuing entitlements over and above the number otherwise issuable to compensate for too few entitlements having been issued in such prior month. All entitlement issuances or purchase requirements under this subparagraph shall give effect to any differential between the entitlement price for the month in which any correction is reflected as compared with the entitlement price for the month as to which the reporting error was made (except with respect to corrections to volumes of crude oil runs to stills where a corresponding adjustment to crude oil receipts was made as contemplated by the term "adjusted crude oil receipts" in § 211.62) and such other factors as the DOE deems appropriate.

(2) Notwithstanding the provisions of paragraph (j)(1) of this section, corrections of reporting errors for the months November 1974 through August 1975 shall be made as follows. DOE shall recalculate for those months the purchase and sale obligations (giving effect to any applicable relief under decisions and orders issued by DOE's Office of Exceptions and Appeals and to the provisions of Special Rule No. 3 for Subpart C) of all refiners and eligible firms based on inclusion in each month of each refiner's and eligible firm's corrected volume (as reported to the DOE) of crude oil runs to stills, volume of old oil included in its crude oil receipts (other than adjustments effected as contemplated by the term "adjusted crude oil receipts" in § 211.62) and eligible product imports. No entitlement price adjustment as contemplated by paragraph (j)(1) of this section shall be made in the calculations under this paragraph (j)(2). DOE shall then aggregate for each refiner and eligible

firm its net purchase or sale amount (in dollars) for these months (giving effect to the published purchase and sale obligations for these months) and apply these amounts in substantially equal portions (translated into current entitlement values) to that refiner's or eligible firm's entitlement purchase or sale obligations for the months of July 1976 through February 1977.

(3) For purposes of this paragraph, errors required to be corrected by the filing of amended reports include (i) clerical errors, and (ii) inaccurate estimates as to the domestic crude oil pricing composition of a particular volume of crude oil where the refiner had no basis, in prior experience or otherwise, on which to make that estimate.

(k) *Failure to consummate transactions.* The DOE may direct refiners or eligible firms that have not purchased the required number of entitlements under this section for a particular month to purchase such required number of entitlements at a price specified by the DOE from any refiner or eligible firm that has entitlements for such month available for sale. The DOE may direct refiners or eligible firms that have entitlements available for sale to sell such entitlements at a price specified by the DOE to refiners or eligible firms that have not purchased their required number of entitlements under this section.

(l) *Certification by non-refiners.* Within twenty-eight (28) days following each month, commencing with the month of January 1978, each firm other than a refiner that has delivered crude oil to a refiner for processing for the account of such firm pursuant to a processing agreement in that month shall certify to that refiner the respective volumes of and that firm's costs for old oil (separately identifying any California lower tier crude oil), upper tier crude oil (separately identifying any California upper tier crude oil), ANS crude oil, stripper well crude oil (as defined in Part 212 of this chapter), incremental tertiary crude oil (as determined pursuant to § 212.78), tertiary incentive crude oil (as determined pursuant to § 212.78), other domestic crude oils the first sale of which is exempt from Part 212 of this

chapter, and imported crude oil contained in the crude oil so delivered to that refiner.

(m) *Adjustments to crude oil and product costs*—(1) *Refiners*—(i) *Entitlements purchased*. (A) The cost of entitlements purchased in a particular month pursuant to this section by refiners, which shall be calculated exclusive of any reduction in such costs in a particular month because of entitlements issued for the importation of eligible products and exclusive of the cost of entitlements purchased in a particular month pursuant to adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section, shall be added to the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased cost to be applied to product prices in the following month under the "A" factor of the general formulae of § 212.83(c)(2) of this chapter): provided, that, to the extent that the obligation of a refiner to purchase entitlements is reduced by volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement, and that the monetary value of that reduced purchase obligation is used to reduce the processing fee otherwise payable by that firm under the processing agreement, or is otherwise passed on to that firm, such monetary value may also be added by that refiner to its cost of crude oil purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the monetary value of the reduced purchase obligation is passed on pursuant to this paragraph.

(B) The reduction in the cost of entitlements purchased in a particular month because of entitlements issued for the importation of eligible products shall be subtracted from the total cost of the product concerned, purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to prices of that product under the "Bt" factor of the appropriate formula for that product of § 212.83(c) of this chapter).

(C) The cost of entitlements purchased in a particular month pursuant to the adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section shall be a cost of crude oil purchased or landed in that month which shall not be applied to product prices pursuant to the "A" factor of the general formulae of § 212.83(c)(2) of this chapter, but which shall instead be applied only to prices for residual fuel oil sold in or into the East Coast market.

(ii) *Entitlements sold*. (A) The sales revenues from entitlements sold in a particular month pursuant to this section by refiners, which shall be calculated exclusive of any reduction in such sales revenues in a particular month pursuant to adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section, and exclusive of any sales revenues from the sale of entitlements issued for the importation of eligible products, shall be subtracted from the cost of crude oil purchased or landed in that month (which is the period "t" (the month of measurement), for purposes of calculating the increased costs to be applied to all product prices in the following month under the "A" factor of the general formulae of § 212.83(c)(2) of this chapter); provided, that, to the extent that the sales revenues from entitlements which are issued for volumes of crude oil processed by a refiner for a firm other than that refiner pursuant to a processing agreement are used to reduce the processing fee otherwise payable by that firm under the processing agreement, or are otherwise passed on to that firm, such sales revenues shall not be subtracted by that refiner from its cost of crude oil purchased or landed in that month, but shall be subtracted from the cost of crude oil purchased or landed in that month by the firm to which the entitlement sales revenues are passed on pursuant to this paragraph.

(B) The sales revenues from entitlements issued for the importation of eligible products which are sold in a particular month shall be subtracted from the total cost of the product concerned, purchased or landed in that month (which is the period "t" (the month of measurement), for purposes

of calculating the increased costs to be applied to prices of that product under the "Bt" factor of the appropriate formula for that product of § 212.83 (c)(2) of this chapter).

(C) The reduction in sales revenues from entitlements sold in a particular month pursuant to the adjustments to a refiner's crude oil runs to stills under paragraph (d)(4) of this section shall be a cost of crude oil purchased or landed in that month which shall not be applied to product prices pursuant to the "A" factor of the general formulae of § 212.83(c)(2) of this chapter, but shall instead be applied only to prices for residual fuel oil sold in or into the East Coast market.

(2) *Resellers and retailers.* The sales revenues from entitlements sold pursuant to this section by resellers or retailers shall be subtracted from the cost of the product in inventory for which the entitlements were issued, so as to reduce the weighted average unit cost of that product in inventory computed pursuant to § 212.92 of this chapter.

(3) *Sales of eligible products to eligible firms.* The total amount of any reductions in the cost of eligible products to the seller because of entitlements issued for the importation of such products, which are required by paragraphs (m)(1) and (m)(2) of this section, shall be applied exclusively to the determination of maximum lawful prices charged in sales in which the purchaser does not receive entitlements for the importation of an eligible product. Separate price calculations shall be made for sales of eligible products in which the purchaser receives entitlements for the importation of eligible products, which shall comply in all respects with the regulations of Subparts E or F of Part 212 of this chapter, except that the amount of increased product cost used to compute such prices shall not be reduced because of entitlements issued for the importation of eligible products.

(4) *Timing.* The date of purchase or sale of entitlements for purposes of determining the date on which a cost or a cost reduction is incurred under § 212.83(c) or § 212.93 of this chapter shall be the date on which the transaction is reported to have taken place

on the monthly transaction report filed with the DOE under paragraph (l) of § 211.66.

(Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

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EDITORIAL NOTE: For FR citations affecting § 211.67, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 211.69 Entitlements adjustment mechanism.

(a) *Scope.* This section applies to all refiners and other firms listed on any Entitlements Notice issued with respect to crude oil runs-to-stills and crude oil receipts during the period October 1, 1980, through January 27, 1981, as well as to any other firms which owe money to, or are entitled to receive money from, the entitlements program.

(b) *Purpose.* This section provides a method for an orderly termination of the domestic crude oil entitlements program originally established in § 211.67.

(c) *Definitions.* For purposes of this section, all terms that are contained in or necessary to the implementation of this section shall have the same meanings as under the provisions of 10 CFR Part 211 that were in effect on January 27, 1981, except as specifically set forth in the following definitions:

"Adjustment" means the receipt of an invoice of recertified crude oil previously booked into a refiner's account in a month during the reporting period which results in a change to the volume and/or category as previously reported on the ERA-49 and a subsequent invoice to a reported volume based on either a prior invoice or a good faith estimate. A good faith estimate is a volume based on that re-

finer's past experience as to its composition for pricing purposes of domestic crude oil of the same origin.

"Amendment" means a resubmission of a previously filed report for a month in the reporting period resulting from an internal company error.

"Claim" means the dollar amount determined by ERA to be owed to a firm resulting from adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to § 211.67 for the period from October 1, 1980, through January 27, 1981, or resulting from an administrative or judicial determination.

"Crude oil runs-to-stills" includes crude oil runs-to-stills applicable to the Entitlements Notice issued for each month in the reporting period, increased for any month for which a firm received entitlements pursuant to § 211.67(a)(3) or § 211.67(a)(5) by a number equal to the number of entitlements issued pursuant to these sections in that month, divided by the national domestic crude oil supply ratio for that month.

"ERA" means the Economic Regulatory Administration of the Department of Energy (DOE).

"Obligation" means the dollar amount determined by ERA to be owed by a firm as a result of adjustments, amendments or other modifications to any one or more Entitlements Notices issued by ERA pursuant to § 211.67 for the period from October 1, 1980, through January 27, 1981, or resulting from an administrative or judicial determination.

"Reporting period" means the period October 1, 1980, through January 27, 1981.

(d) *Determination of claims and obligations*—(1) *Amendments*. Firms shall correct all errors contained in reports filed pursuant to § 211.66 or § 211.67(a)(5)(ii) for the reporting period by filing amended reports which must be received by ERA by August 15, 1981. For each month for which an amended report is filed by a firm pursuant to this subsection, ERA shall determine for that firm: (i) The obligation for that month by determining the dollar value of the amendment, using the entitlement data for

that month; or (ii) the claim for that month by determining the dollar value of the amendment, using the entitlement data for that month.

(2) *Invoice adjustments*. (i) All refiners shall report to DOE on Form ERA-49 for each reported category of crude oil the sum of all adjustments to the volume of crude oil receipts during the reporting period not previously reported to ERA. If a refiner has no adjustments for the reporting period, it shall file a report of zero adjustments. Reports must be received by ERA by August 15, 1981.

(ii) Refiners shall designate on the Form ERA-49 the month during the reporting period when the crude oil subject to the adjustment first was received.

(iii) For each month for which an adjustment is filed by a refiner pursuant to this subsection, ERA shall determine for that refiner: the obligation for that month by determining the dollar value of the increased number of barrels of deemed old oil, using the deemed old oil ratios and the entitlement price for that month; or, the claim for that month by determining the dollar value of the decreased number of barrels of deemed old oil, using the deemed old oil ratios and the entitlement price for that month.

(3) *Other claims and obligations*. (i) ERA shall determine the dollar value of any other claims or obligations of any firm in any month which is not otherwise included in paragraphs (d)(1) or (2) of this issue by using the entitlement price and other entitlement data for that month.

(ii) To the extent that any claim or obligation determined pursuant to paragraph (d)(3)(i) of this section is not applicable to a particular month in the reporting period, ERA shall prorate the amount of such claim or obligation equally among all months in the reporting period.

(e) *Total calculation*. (1) ERA shall determine the net calculation for each month in the reporting period by subtracting the sum of all obligations for that month from the sum of all claims for that month.

(2) The proportional share of the net calculation for each firm for each month in the reporting period shall be

determined by multiplying the net calculation by a fraction. The numerator of the fraction is equal to the crude oil runs-to-stills for that firm used to compute the Entitlements Notice for that month, and the denominator is equal to the sum of the crude oil runs-to-stills of all firms used to compute the Entitlements Notice for that month.

(3) For each firm, ERA shall determine the sum of its proportional shares of the net calculations for each month as computed pursuant to paragraph (e)(2) of this section, which shall be the total calculation for that firm.

(f) *Net obligations and net claims.* ERA shall determine each firm's net obligation or net claim as follows:

(1) If the sum of its claims for the reporting period, minus the sum of its obligations for the reporting period, and minus its total calculation (determined pursuant to paragraph (e) of this section) is greater than zero, it is a net claim and the firm shall be entitled to that sum of money from firms with net obligations.

(2) If the sum of its claims for the reporting period, minus the sum of its obligations for the reporting period, and minus its total calculation (determined pursuant to paragraph (e) of this section) is less than zero, it is a net obligation and the firm shall be required to pay that sum of money to firms with net claims.

(g) *Settlement of net obligations and net claims.* (1) As soon as practicable after August 15, 1981, ERA shall publish in the FEDERAL REGISTER a list of the net claim or net obligation of each firm. Firms with net obligations shall complete payments of such obligations to firms with net claims within 10 days from the date of publication of the list in the FEDERAL REGISTER.

(2) ERA may direct firms which have not paid monies equal to their net obligations under this section to transfer money, not in excess of their net obligation, to such firms as determined by ERA.

(3) Within 20 days from the date of publication of the list of net claims and obligations, each firm with a net claim or obligation shall certify to ERA in writing that it has completed

the transactions required by this section, with whom the transaction has been completed and the dollar amounts for each firm. Certifications should be addressed to:

Entitlements Program Office, Economic Regulatory Administration, 20th Street Postal Station, P.O. Box 19326, Washington, D.C. 20461

(4) If a firm with a net claim does not receive any or all of its money from firms with net obligations, that firm may apply to ERA for an order establishing the amount of the deficiency. Upon issuance of the order by ERA, the firm shall be deemed to have a claim against the entitlements program pursuant to paragraph (h)(1) of this section for the amount of the deficiency.

(h) *Post-clean-up claims and obligations.* (1)(i) If after issuance of the list of net obligations and net claims, the Office of Hearings and Appeals of the Department of Energy, the Federal Energy Regulatory Commission or a court of competent jurisdiction determines, in an order no longer subject to appeal, that any party is entitled to a claim against the entitlements program, firms listed on the list of net obligations and net claims issued pursuant to paragraph (g)(1) of this section shall owe the amount of the claim.

(ii) Each firm shall pay to the party receiving the order an amount equal to the claim determined pursuant to paragraph (h)(1)(i) of this section multiplied by a fraction, the numerator of which is equal to the total crude oil runs-to-stills for that firm used to compute Entitlements Notices in the reporting period, and the denominator of which is the sum of the crude oil runs-to-stills for all firms used to compute Entitlements Notices in the reporting period.

(2)(i) If after issuance of the list of net obligations and net claims, the Office of Hearings and Appeals of the Department of Energy, the Federal Energy Regulatory Commission or a court of competent jurisdiction determines, in an order no longer subject to appeal, that any party has an obligation to the entitlements program, other than as a result of entitlements enforcement actions, firms listed on

the list of net obligations and net claims issued pursuant to paragraph (g)(1) of this section shall be owed that obligation.

(ii) The party shall pay to each such firm an amount equal to the obligation multiplied by a fraction, the numerator of which is equal to the total crude oil runs-to-stills for that firm used to compute Entitlements Notices in the reporting period, and the denominator of which is the sum of the crude oil runs-to-stills for all firms used to compute Entitlements Notices in the reporting period.

(3) For purposes of paragraphs (h)(1) and (h)(2) of this section, an order for which there is no explicit statutory or regulatory time limit on appeals shall be deemed to be "no longer subject to appeal" if the order is not appealed within 60 days from the date of issuance of the order.

(The information collection requirements contained in paragraph (g)(3) were approved by the Office of Management and Budget under control number 1903-0073)

[46 FR 36098, July 13, 1981, as amended at 46 FR 43654, Aug. 31, 1981; 46 FR 63209, Dec. 31, 1981]

APPENDIX A TO PART 211—STANDBY REGULATIONS

211.1 STANDBY MANDATORY CRUDE OIL ALLOCATION AND REFINERY YIELD CONTROL PROGRAMS

1. *Scope.* This Standby Regulation sets forth the DOE Standby Mandatory Crude Oil Allocation and Refinery Yield Control Programs. This Standby Regulation also provides for the distribution of such amounts of SPR crude oil as the Secretary of Energy determines pursuant to Part 220 of this Chapter shall be distributed under this Standby Regulation.

2. *Applicability.* (a) This Standby Regulation is effective beginning on the day:

(i) When the emergency allocation provisions of the Agreement on an International Energy Program (IEP) take effect, unless the Secretary of Energy determines that this Standby Regulation shall not be effective on that date; or

(ii) When ordered by the Administrator.

(b) This Standby Regulation terminates:

(i) On the sixtieth (60th) calendar day after the emergency allocation provisions of the IEP terminate, unless the Secretary of Energy determines this Standby Regulation should terminate at an earlier date; or

(ii) When ordered by the Administrator, if this Standby Regulation is made effective under paragraph 2(a)(ii) hereof.

3. *Exemption.* (a) Refiners that have a DOE certified crude oil refining capacity not exceeding 175,000 barrels per day are exempt from the provisions of this Standby Regulation, unless the Administrator determines that this exemption is not warranted by the severity of the crude oil supply shortage that is the basis for the effectiveness of this Standby Regulation and issues an order making the exemption inapplicable to such refiners. During the period this exemption is applicable, the provisions of §§ 211.62, 211.65 and 211.71, Title 10, Chapter II, Part 211, Subpart C (Crude Oil and Refinery Yield Control) in effect on January 27, 1981 shall become effective with respect to such refiners.

(b) Sellers that have a DOE certified crude oil refining capacity not exceeding 50,000 barrels per day are exempt from the sales obligations of this Standby Regulation, unless (i) the Administrator determines that this exemption is not warranted by the severity of the crude oil supply shortage that is the basis for the effectiveness of this Standby Regulation and issues an order making the exemption inapplicable to such sellers; or (ii) total U.S. crude oil consumption decreases by seven percent or more as a direct or indirect result of a crude oil supply shortage.

4. For purposes of this Standby Regulation, a term shall have the same meaning as it did for purposes of the provisions of Title 10, Chapter II, Part 211, Subpart C (Crude Oil and Refinery Yield Control) in effect on January 27, 1981, except for the following terms:

"Administrator" means the Administrator of the Economic Regulatory Administration, Department of Energy.

"Allocation period" means a calendar month, except as otherwise ordered by the Administrator.

"Base period" means the twelve (12) consecutive calendar months ending with the second month prior to the month in which this Standby Regulation becomes effective unless otherwise ordered by the Administrator.

"Base period average monthly crude oil runs to stills" means a refiner's total crude oil runs to stills for all its refineries during the base period as reported on the Bureau of Mines Form P-320, including crude oil processed for the refiner's account by other refiners, divided by the number of days in the base period and multiplied by the number of days in the allocation period.

"Buyer" means any refiner whose estimated crude oil runs to stills during the allocation period is less than the national utilization rate multiplied by that refiner's base

period average monthly crude oil runs to stills.

"Crude oil runs to stills" means, in the case of a refiner other than a petrochemical producer, the total number of barrels of crude oil input to distillation units or directly to downstream facilities processed by a refiner for its own account, and the number of barrels processed for its account by other refiners, measured in accordance with Bureau of Mines Form P-320. In the case of a petrochemical producer, "crude oil runs to stills" means the total number of barrels of crude oil input to processing units for conversion into petrochemicals.

"DOE" means the Department of Energy, established by Pub. L. 95-91 (August 14, 1977).

"ERA" means the Economic Regulatory Administration, Department of Energy.

"Estimated crude oil runs to stills" means the volume of crude oil a refiner estimates it will run to stills for its own account during an allocation period for all of its refineries, the volume of crude oil to be processed for nonrefiners, the volume of crude oil to be processed for the refiner's account by other refiners, and, if SPR crude oil is distributed in a manner other than pursuant to this Standby Regulation, the volume of SPR crude oil purchased from, or received through exchange with, the Government. A refiner's estimated runs to stills shall be based on the volume of its total crude oil supply (as defined in paragraph 4 of this Standby Regulation) that could be processed in its refineries or for its account by other refiners in the particular allocation period, excluding crude oil purchased or to be purchased under this Standby Regulation. If the exemption in paragraph 3(a) of this Standby Regulation is applicable, "estimated crude oil runs to stills" shall not include the quantity of crude oil a refiner-seller estimates it will be required to sell to refiner-buyers during the allocation period pursuant to the provisions made effective by paragraph 3(a) of this Standby Regulation.

"Firm" means any association, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship or any other entity however organized including charitable, educational, or other eleemosynary institutions, and the Federal Government including corporations, departments, Federal agencies, and other instrumentalities, and State and local governments. The ERA may, in regulations and forms issued in this part, treat as a firm: (1) a parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (2) a parent and its consolidated entities, (3) an unconsolidated entity, or (4) any part of a firm.

"IEA" means the International Energy Agency established to implement the IEP.

"IEP" means the International Energy Program established pursuant to the Agreement on an International Energy Program signed at Paris, France, on November 18, 1974, including (a) the Annex entitled "Emergency Reserves," (b) any amendment to such Agreement that includes another nation as a Party to such Agreement, and (c) any technical or clerical amendment to such Agreement.

"National base period average monthly crude oil runs to stills" means the total base period average monthly crude oil runs to stills of all U.S. refiners.

"National estimated crude oil runs to stills" means, for any allocation period, the total of the estimated crude oil runs to stills for all U.S. refiners, plus the volume of SPR crude oil to be allocated under this Standby Regulation, minus the quantity of crude oil directed to all refiners pursuant to paragraph (5) (d) (2) or paragraph 7(d) of this Standby Regulation.

"National utilization rate" means national estimated crude oil runs to stills for an allocation period divided by national base period average monthly crude oil runs to stills.

"New refining capacity" means for each refiner, the capacity of its refineries, as certified by the DOE, operated continuously in the normal course of such refiner's business for a period of at least one full calendar month, which must include the month preceding the month of the effective date of this Standby Regulation, but for less than the full 12 months of the base period.

"Petrochemical plants" means those industrial plants, regardless of capacity, that process petrochemical feedstocks and obtain at least thirty (30) percent conversion, by weight, to petrochemicals or other products that are converted to petrochemicals, as long as the weight of hydrocarbon contained in the final petrochemical is equal to at least thirty (30) percent of the initial petrochemical feedstock fed to the plant under consideration.

"Refiner" means a firm which owns, operates or controls the operations of one or more refineries within the United States.

"Refinery" means an industrial plant, regardless of capacity, processing crude oil feedstock and manufacturing refined petroleum products, residual fuel oil or petrochemicals, and shall include a petrochemical plant operated continuously in the normal course of business during the base period.

"Seller" means any refiners whose estimated crude oil runs to stills during the allocation period is greater than the national utilization rate multiplied by that refiner's base period average monthly crude oil runs to stills, including the United States Government when SPR crude oil is allocated

pursuant to this Standby Regulation. Except as expressly provided, the provisions of paragraphs (a) and (c)-(j) of paragraph 5 of this Standby Regulation shall not apply to the U.S. Government.

"Total crude oil supply" means the total quantity of crude oil to which a refiner has access during an allocation period, including, but not limited to, crude oil owned, controlled or purchased by the refiner in associated storage, in nonassociated storage, in transit for delivery to a refinery during the allocation period, or to be processed for the account of non-refiners, excluding pipeline fill and tank bottoms. If the exemption in paragraph 3(a) of this Standby Regulation is applicable, "total crude oil supply" shall not include the quantity of crude oil a refiner-seller estimates it will be required to sell to refiner-buyers during the allocation period pursuant to the provisions made effective by paragraph 3(a) of this Standby Regulation.

"United States" means the several states, the District of Columbia, Puerto Rico, the territories and possessions of the United States other than the Panama Canal Zone, and the Hawaiian Free Trade Zone.

5. Method of Allocation. (a) General rule.

(1) In each allocation period a buyer shall be entitled to purchase and a seller shall be required to offer for sale an amount of crude oil equal to the difference between

(i) the national utilization rate multiplied by the refiner's base period average monthly crude oil runs to stills, and

(ii) the refiner's estimated crude oil runs to stills during the allocation period.

(2) Definitions.

X=quantity of crude oil a buyer is entitled to purchase (if X is a positive number) or required to offer for sale (if X is a negative number) during the allocation period

A=refiner's Estimated Crude Oil Runs to Stills during the allocation period

B=refiner's Base Period Average Monthly Crude Oil Runs to Stills

C=National Estimated Crude Oil Runs to Stills for all U.S. refiners for the allocation period

D=National Base Period Average Monthly Crude Oil Runs to Stills by all U.S. refiners

(3) Formula.

$$(C/D \times B) - A = X$$

(4) **Calculation Procedure.** For each allocation period, the amount of crude oil a refiner is eligible to buy or required to offer for sale shall be calculated as follows:

(i) Each U.S. refiner shall submit to the ERA its estimate of crude oil runs to stills for the allocation period.

(ii) For each allocation period, the ERA shall compute the national estimated crude oil runs to stills, which shall equal the total

estimated crude oil runs to stills for all U.S. refiners for that allocation period, plus the quantity, if any, of SPR crude oil allocated under this Standby Regulation, minus the quantity of crude oil directed to all refiners pursuant to paragraph (5)(d)(2) or paragraph 7(d) of this Standby Regulation.

(iii) The ERA shall compute the average daily crude oil runs to stills during the base period for each domestic refiner by dividing the total volume of that refiner's crude oil runs to stills in the base period by the number of days in the base period (365 or 366).

(iv) The ERA shall multiply this daily average volume of crude oil runs to stills for each refiner by the number of days in the allocation period, to determine the refiner's base period average monthly crude oil runs to stills for the allocation period.

(v) The ERA shall compute a national base period average monthly crude oil runs to stills by aggregating the base period average monthly crude oil runs to stills of all U.S. refiners for the allocation period.

(vi) The ERA shall divide the national estimated crude oil runs to stills (clause (ii)) for the allocation period by the national base period average monthly crude oil runs to stills (clause (v)) to determine the national utilization rate for the allocation period.

(vii) The ERA shall multiply the national utilization rate by the refiner's base period average monthly crude oil runs to stills for the allocation period (clause (iv)) to determine the refiner's allowable crude oil runs to stills during the allocation period.

(viii) The ERA shall subtract the refiner's estimated crude oil runs to stills (clause (i)) from the refiner's allowable crude oil runs to stills during the allocation period (clause (vii)) to determine the refiner's purchase or sale obligation, subject to any adjustments made pursuant to (d)(2) of this paragraph or paragraph 7(d) of this Standby Regulation.

(ix) If the result of the calculation in clause (viii) is positive, the refiner is entitled to purchase that quantity of crude oil.

(x) If the result of the calculation in clause (viii) is negative, the refiner is required to offer that quantity of crude oil for sale, unless the exemption provided for in paragraph (3) of this Standby Regulation is applicable to that refiner.

(5) **First allocation period.** The first allocation period shall commence on the date ordered by the Administrator.

(b) Buyers. Each buyer shall:

(1) be entitled to purchase, either directly or through exchange, from a seller, a quantity of crude oil equal to the amount computed pursuant to paragraph (5)(a) of this Standby Regulation and,

(2) be required to refine or have processed any crude oil purchased or exchanged for

crude oil purchased pursuant to this Standby Regulation within 60 days following the date of execution of the sale/purchase agreement.

(3) Any buyer desiring to purchase SPR crude oil under this Standby Regulation in an allocation period must submit to DOE an offer in accordance with the procedures set forth in Subpart C of Part 220 of this chapter.

(c) *Sellers.* Except as provided in paragraph (3) of this Standby Regulation, each seller shall be required to offer for sale, directly or through exchange, to buyers a quantity of crude oil equal to the amount computed pursuant to paragraph (5)(a) of this Standby Regulation; provided that the sales obligations with respect to buyers that have a DOE certified crude oil refining capacity of 50,000 barrels per day or less shall be distributed on a pro-rata basis among all sellers, and each seller's pro-rata share of such sales obligations shall be equal to its percentage share of the total sales obligations, as specified in the buy/sell notice issued pursuant to paragraph (5)(g) of this Standby Regulation.

(d) *Adjustments to Purchase and Sale Amounts.* (1) The ERA shall recalculate the buy/sell list for each allocation period based on actual crude oil runs to stills and crude oil purchased under this Standby Regulation during that allocation period and then make appropriate adjustments in a subsequent allocation period to reflect what each refiner's sale or purchase amount should have been, except that positive adjustments to a buyer's allocations in subsequent allocation periods will not be made if that buyer failed to purchase its total allocations during the allocation period in which the sales were made. Such recalculation shall be for the Primary purpose of correcting errors in estimates, and shall also:

(i) Increase a seller's sales obligation in any allocation period to reflect crude oil offered for sale by that seller but not purchased by a buyer in a prior allocation period;

(ii) Decrease a seller's sales obligation in any allocation period to deduct crude oil sales in excess of the amount required to be offered for sale in a prior allocation period pursuant to paragraphs (5)(f) and (5)(i)(2) of this Standby Regulation; and,

(iii) Either decrease a refiner's sales obligation or increase its purchase opportunity in any allocation period or periods, as the case may be, to reflect any adjustments made under (5)(d)(2) of this paragraph or paragraph 7(d) of this Standby Regulation and to account for sales made by that refiner under the IEP in the current or one or more previous allocation periods, where the refiner reasonably could not have foreseen such a sale and adjusted its estimated crude oil runs to stills for the allocation period in

question to reflect the sale, and to reflect any purchases by a refiner made under the IEP.

(2) Whenever the Administrator determines that a refined petroleum product or residual fuel oil is or potentially will be in short supply in any region or area of the United States, the Administrator may adjust the sales obligation or purchase opportunity of one or more refiners which produce that refined petroleum product or residual fuel oil and supply or are capable of supplying that refined petroleum product or residual fuel oil in or into those regions or areas experiencing shortage conditions, to permit such refiners to operate one or more of their refineries, as specified by the Administrator, at a rate greater than the national utilization rate, provided that such refiners agree to supply that refined petroleum product or residual fuel oil at a level specified by the Administrator in or into those areas or regions experiencing shortage conditions.

(e) *New refining capacity.* The ERA may adjust a refiner's base period average monthly crude oil runs to stills to reflect new refining capacity, pursuant to application by that refiner under provisions of subpart G of Part 205 of this Chapter that were in effect on January 27, 1981.

(f) *Adjustments to Base-Period Crude Oil Runs to Stills and Directed Transactions.*

(1) Prior to the first day of the second allocation period, a refiner may request the Administrator to adjust its based period crude oil runs to stills for unusual and non-recurring operating conditions during the base period at one or more of its refineries. If the Administrator does not approve, in whole or in part, or disapprove the request within fifteen (15) business days of receipt of the request, it shall be deemed denied.

(2) Notwithstanding the provisions of this Standby Regulation, the Administrator may:

(i) Order a refiner to offer to sell crude oil to reduce its total crude oil supply as defined in paragraph (4) of this Standby Regulation over and above any reduction in its total crude oil supply required under paragraphs (5) (a) through (c) of this Standby Regulation; and (ii) order a refiner purchasing crude oil under this Standby Regulation to place and retain that crude oil in its inventory.

(g) *Buy/Sell Notice and Negotiation of Transactions.* (1) Except for the first allocation period, a buy/sell notice shall be published at least 10 days prior to the beginning of the allocation period. Except when the exemption in paragraph 3(a) of this Standby Regulation is applicable, each buy/sell notice shall contain two lists. One list shall set forth the quantity of crude oil each buyer whose DOE certified crude oil refin-

ing capacity is 50,000 barrels per day or less is eligible to purchase and the quantity of crude oil that each seller shall be obligated to offer for sale to such buyers. The other list shall set forth the quantity of crude oil each buyer whose DOE certified crude oil refining capacity exceeds 50,000 barrels per day is eligible to purchase and the quantity of crude oil that each seller shall be obligated to offer for sale to such buyers (less the obligations shown on the first list). If SPR crude oil is distributed under this Standby Regulation for an allocation period, the buy/sell notice shall set forth to the maximum extent practicable information concerning the quantity, quality and delivery points of the SPR crude available for sale; any maximum or minimum volume restrictions; and any delivery and/or transportation restrictions.

(2) Upon publication of the notice, buyers and sellers shall negotiate purchases and sales of crude oil allocated pursuant to the notice. All sales, except directed sales pursuant to paragraph (5)(i) of this Standby Regulation, must be contracted for within ten (10) days after the publication of the buy/sell notice, and all deliveries must be completed within thirty (30) days following the date of execution of the sale/purchase agreement.

(3) The ERA may issue a supplemental notice for an allocation period to reflect adjustments under paragraph (5)(d)(1)(iii) of this Standby Regulation for voluntary or mandatory sales under the IEP for that allocation period, where the operations of the refinery making the sale could be adversely affected by reason of the sale and where the refinery could not reasonably foresee the sale so as to have adjusted its estimated crude oil runs to stills accordingly.

(h) *Terms and Conditions of Sales.* (1) The terms and conditions of each sale, processing agreement, or exchange of crude oil, other than sales prices, shall be consistent with normal business practices.

(2) Sellers shall deliver crude oil purchased pursuant to this Standby Regulation to any refinery designated by the buyer, whether or not it is operated by the buyer; *provided*, that the buyer (i) has title to the product or products refined from the purchased crude oil when the refining process is completed, or (ii) sells or exchanges such product in accordance with normal business practices.

(3) Crude oil offered for sale must be suitable for processing in the buyer's refinery or the refinery designated by the buyer, *provided*, that the refinery so designated does not require a significantly higher quality of crude oil than the buyer's own refinery or refineries. Crude oil is deemed to be suitable for processing in a refinery if it has historically been processed in the refinery or if it has the same or similar characteris-

tics as crude oil that has historically been processed in the refinery. A seller may not be required to supply a specific type of crude oil to a buyer's refinery if the crude oil supplied would account for a greater percentage of the refinery's total crude oil runs to stills in the allocation period concerned than was the case with similar or higher quality crude oils during the previous twenty-four month period.

(4) Crude oil offered to a buyer must be practical for delivery to and physically capable of being delivered to the buyer's refinery or a refinery designated by the buyer. The seller and the buyer shall make mutually satisfactory arrangements for the delivery of allocated crude oil to the buyer's refinery or to the designated refinery.

(5) All crude oil except SPR crude oil sold pursuant to this Standby Regulation shall be priced in accordance with the provisions of Standby Regulation 212-1. SPR crude oil shall be priced in accordance with the provisions of § 220.32 of this chapter.

(6) Exchanges of crude oil may be utilized to comply with the purchase and sale provisions of this Standby Regulation.

(7) Sales of SPR crude oil pursuant to this Standby Regulation shall be conducted in accordance with the procedures set forth in Subpart C of Part 220 of this chapter.

(8) The buyer shall be responsible for the transportation, including the cost thereof, of SPR crude oil from the delivery points specified by DOE to its refinery.

(i) *Failure to Negotiate Transactions.* (1) Each buyer shall make its best effort to consummate purchases of crude oil under this Standby Regulation from sellers prior to requesting assistance from the ERA. A buyer that is able to demonstrate its inability to consummate a sale despite making such effort may request that the ERA direct one or more sellers to sell a suitable type of crude oil to such buyer. Such a request must be made in accordance with the procedures established under 10 CFR Part 205, Subpart G that were in effect on January 27, 1981, and must be received by the ERA no later than 12 days after the publication of the buy/sell notice for the allocation period for which the assignment of a seller is requested. Such a request must also document the buyer's inability to purchase crude oil from sellers by supplying the following to the ERA:

(i) Name of the buyer and the person authorized to act for the buyer in transactions under this Standby Regulation.

(ii) Names and locations of each refinery for which crude oil has been sought; whether the buyer owns the refinery; the amount of crude sought for each refinery; and the technical specifications and proportions of crude oil that have historically been processed in each refinery.

(iii) Statement of any restrictions, limitations or constraints on the buyer's purchases of crude oil, particularly concerning the manner or time of deliveries.

(iv) Statement describing terms and conditions or processing agreements that the buyer plans to enter into for purposes of having the crude oil refined and the extent to which such processing agreements are consistent with the buyer's normal business practices.

(v) Names and locations of all sellers from which crude oil has been sought under the buy/sell notice and the volume and specifications of the crude oil sought from each seller.

(vi) The response of each seller to which a request to purchase crude oil has been made, and the name and telephone number of the individual contacted at each such seller.

(vii) Such other pertinent information as the ERA may request.

(2) Upon receipt of a request for a directed sale under paragraph (1), the ERA may direct one or more sellers that have not sold their required sales obligations for the allocation period to sell crude oil to the buyer. In directing sellers to make such sales, the ERA shall consider which seller or sellers can best be expected to consummate particular directed sales. If the buyer declines to purchase crude oil from the seller specified by the ERA, the rights of that buyer to purchase that volume of crude oil are forfeited during that allocation period, provided that the seller or sellers have fully complied with the provisions of this Standby Regulation. If the ERA determines that a valid directed sale request cannot reasonably be expected to be consummated by a seller that has not completed all or substantially all of its sales obligation for the allocation period, the ERA may issue one or more directed sales orders that would result in one or more sellers selling more than their published sales obligations for that allocation period.

(j) *Coordination with the IEP.* (1) An IEP-designated domestic reporting company that submits a written voluntary offer pursuant to the IEP shall simultaneously transmit a copy of the offer to the ERA if the offer either results in crude oil or petroleum products intended to be imported to the U.S. being rerouted to another country, or results in crude oil being exported from the U.S., or crude oil or petroleum products being rerouted from another country to the U.S.

(2) The DOE will notify the IEA within forty-eight (48) hours of being notified of a voluntary offer as to whether acceptance of such offer by the IEA could impair the operation of the U.S. domestic allocation system.

6. Procedures and reporting requirements. For purposes of this Standby Regulation, the following reports must be made:

(a) *Filing.* All matters pertaining to the allocation of crude oil and the refinery yield control program shall be addressed to the ERA in accordance with the provisions of 10 CFR section 205.12 that were in effect on January 27, 1981, unless otherwise provided.

(b) *Monthly Reports.* Not later than the tenth (10th) day of each allocation period, unless ordered otherwise by the Administrator, each firm subject to this Standby Regulation shall file with the ERA a report for each of its refineries which includes (1) a statement of the actual crude oil runs to stills for each refinery for the preceding allocation period and an estimate of its crude oil runs to stills for the next allocation period; (2) a statement of its actual total crude oil supply as defined in paragraph (4) of this Standby Regulation for the preceding allocation period and an estimate of its total crude oil supply for the next allocation period; and (3) a statement of the volume of crude oil (other than crude oil sold pursuant to the provisions of this Standby Regulation) sold during the preceding allocation period and an estimate of such sales for the next allocation period. For the first allocation period, such information must be filed on the date specified by the Administrator.

(c) *Transaction Report.* Within forty-eight hours of the completion of arrangements therefor, each transaction made to comply with this Standby Regulation shall be reported by telephone and confirmed in writing or by telex to the ERA by both the buyer and seller. This report shall identify the seller, the buyer, the refineries to which the crude oil is to be delivered, the volumes of crude oil sold or purchased, and the period over which the delivery is expected to take place.

7. Mandatory refinery yield control program. (a) *Purpose.* The refinery yield control program is designed to require each refiner to utilize available supplies of crude oil in a manner best suited to ensure adequate production levels of refined petroleum products and residual fuel oil which are or may be in short supply.

(b) *Scope.* This paragraph applies as specified to the production of refined petroleum products and residual fuel oil from crude oil by each refiner in the United States.

(c) *Product Yield Controls.* (1) *Definitions.* As used in this paragraph.

"Base percentage yield" means the ratio, expressed as a percentage, of the total number of barrels of a particular refined petroleum product or residual fuel oil produced by a refiner during a specified base period to the refiner's total crude runs to stills in that base period.

"Base period" means an appropriate historical period determined by the Administrator during which the petroleum product or residual fuel oil was produced by the refiner.

(2) *Adjustment of Base Percentage Yield.* Whenever a refined petroleum product or residual fuel oil is or will be in short supply, the ERA may direct refiners to adjust their base percentage yield of that product or residual fuel oil in order to increase the relative output of that product or residual fuel oil in short supply. Such directives may require either percentage changes in yields or changes in yields that would permit the refiner(s) to supply a product or residual fuel oil at specified levels. The ERA may direct a refiner or refiners to adjust yields of a particular refined petroleum product or residual fuel oil for a specific refinery or on a geographic or national basis.

(3) *Joint Compliance.* Upon approval by the ERA, two or more refiners may adjust their base percentage yield of a particular refined petroleum product or residual fuel oil on a pooled basis such that the combined production of that product or residual fuel oil by the two or more refiners would equal the combined production of those refiners if each refiner had separately equalled or exceeded its base percentage yield of that product or residual fuel oil.

(d) *Allocation of Crude Oil.* The ERA may adjust the quantities of crude oil allocated among refiners pursuant to this Standby Regulation in a manner designed to ensure desired production levels of refined petroleum products or residual fuel oil in short supply for which an adjusted base percentage yield has been directed. Such adjustments shall be designed to meet the objectives of this Standby Regulation, so that refiners which increase production in excess of their adjusted percentage yield of that product or residual fuel oil, or which decrease production to less than the adjusted percentage yield of that product or residual fuel oil, may be allocated greater or lesser quantities of crude oil during the next allocation period, respectively.

8. *Special Allocation Procedures.* When the provisions of this Standby Regulation are in effect, the Administrator may order the provisions of §§ 211.62, 211.65 and 211.71 of this Part that were in effect on January 27, 1981 to be effective with the following modifications to paragraphs (c) and (i) of § 211.65 and, in that event, paragraphs 3, 4 (except the definitions of "Administrator," "DOE" and "ERA"), 5, 6 and 7 of this Standby Regulation shall not be in effect:

(a) Paragraph (c) is modified by revising the heading and subparagraph (2) to read as follows:

"(c) *Review of eligibility for allocations, adjustments to purchase opportunities, and emergency allocations.*

"(2)(i) Notwithstanding any provision of § 211.62 or any other provision of this section, upon application at any time by any refiner, the ERA may grant that refiner an emergency allocation for one or more allocation periods, or for part of an allocation period, the effect of which shall be to maintain that refiner's crude oil supplies at a level equivalent to that refiner's supply level for the corresponding period of the previous year; *provided, that*, such refiner shall be required to demonstrate that it is incurring, or will incur in the allocation period for which the allocation is sought, a significant reduction, due to circumstances over which such refiner reasonably had no control, in its supply of crude oil due directly or indirectly to shortages of crude oil in the world markets. Each application shall contain the information (including documentation where appropriate) necessary for the ERA to determine that the applicant's reduction in crude oil supplies is due to circumstances over which the applicant reasonably had no control. In granting a request of a refiner for an emergency allocation, the ERA may direct one or more refiner-sellers to sell a suitable type of crude oil to such refiner pursuant to paragraph (j) of this section.

"(ii) In the event the ERA grants an emergency allocation to any refiner that is a refiner-seller under this section, that refiner-seller shall be relieved of the appropriate portion of its sales obligation for a period of time as specified by the Administrator and the sales obligation of such refiner-seller so relieved shall be distributed on a pro-rata basis among all remaining refiner-sellers.

"(iii) The ERA may (A) grant an emergency allocation to a refiner under this paragraph, (B) adjust any allocation or sales obligation shown on the buy/sell notice specified in paragraph (g) of this section or (C) issue one or more directed sales orders that would result in one or more refiner-sellers selling more than their published sales obligations for that allocation period pursuant to subparagraph (3) of paragraph (j) of this section, without issuing a supplemental buy/sell notice listing such emergency allocations, adjustments to allocations or increased sales obligations; *provided, that*, no such directed sale shall increase any refiner-seller's sales obligation by more than twenty-five percent (25%) and any such directed sale amounts shall serve to reduce the refiner-seller's obligation in the next allocation period."

(b) Paragraph (i) is modified by revising subparagraph (4) to read as follows:

"(4) All crude oil sold pursuant to this section to refiners other than small refiners shall be priced in accordance with the provisions in standby Regulation 212-1 of Part 212. All crude oil sold pursuant to this section to small refiners whose DOE certified crude oil refining capacity is 50,000 barrels per day or less shall be priced in accordance with the provisions in § 212.94 of this chapter that were in effect on January 27, 1981. With respect to sales of crude oil pursuant to this section to refiners whose DOE certified crude oil refining capacity is greater than 50,000 barrels per day but less than 175,000 barrels per day, the Administrator may determine that either the provisions in § 212.94 of this chapter that were in effect on January 27, 1981 or the provisions in standby Regulation 212-1 of Part 212 shall apply."

(The information collection requirements contained in Standby Regulation 211-1, paragraphs 5(a)(4)(i), 5(i)(1), 6(b), and 6(c) were approved by the Office of Management and Budget under control number 1903-0074)

[46 FR 20512, Apr. 3, 1981, as amended at 46 FR 63209, Dec. 31, 1981]

PART 212—MANDATORY PETROLEUM PRICE REGULATIONS

Subpart A—General

Sec.
212.10 General rules.

Subparts B—C—[Reserved]

Subpart D—Producers of Crude Oil

212.78 Tertiary incentive crude oil.

Subparts E—H—[Reserved]

Subpart I—Prenotification and Reporting

212.126 Reports.
212.127 Manner of reporting.

APPENDIX A TO PART 212—STANDBY REGULATIONS

AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, E.O. 11748, 38 FR 33577; Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11748, 38 FR 33575; Cost of Living Council Order Number 47, FR 24, unless otherwise noted.

EDITORIAL NOTES: 1. Nomenclature changes affecting this part appear at 40 FR 40820, Sept. 4, 1975; 41 FR 36184, Aug. 26, 1976.

2. Regulations in this part are affected by a document published at 44 FR 37938, June 29, 1979. See the redesignation table appearing in the Finding Aids section of this volume.

Subpart A—General

§ 212.10 General rules.

(a) [Reserved]
(b) No firm (including an individual) may knowingly pay a price for any covered product which exceeds the maximum price at which that product is permitted to be sold to the class of purchaser concerned under this part.

(c) Paragraph (b) of this section does not apply to the purchase of a covered product under circumstances of economic or other coercion in which the purchaser, because of its need for that product, had no reasonable alternative but to pay the unlawful price and he promptly reports the payment of the unlawful price to the Department of Energy.

[40 FR 60037, Dec. 31, 1975, as amended at 46 FR 20516, Apr. 3, 1981]

Subparts B—C—[Reserved]

Subpart D—Producers of Crude Oil

§ 212.78 Tertiary incentive crude oil.

Annual prepaid expenses report. By January 31 of each year after 1980, the project operator with respect to any enhanced oil recovery project for which a report had been filed previously with DOE pursuant to paragraph (h)(2)(i) of this section as that paragraph was in effect on January 27, 1981, shall file with DOE a report in which the operator shall certify to DOE (a) which of the expenses that had been reported previously to DOE pursuant to paragraph (h)(2)(i) of this section as that paragraph was in effect on January 27, 1981, were prepaid expenses; (b) the goods or services for which such expenses had been incurred and paid; (c) the dates on which such goods or services are intended to be used; (d) the dates on which such goods or services actually are used; (e) the identity of each qualified producer to which such prepaid

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expenses had been attributed; and (f) the percentage of such prepaid expenses attributed to each such qualified producer. An operator shall file an annual prepaid expenses report each year until it has reported the actual use of all the goods and services for which a prepaid expense had been incurred and paid. For purposes of this paragraph, a prepaid expense is an expense for any injectant or fuel used after September 30, 1981, or an expense for any other item to the extent that IRS would allocate the deductions (including depreciation) for that item to the period after September 30, 1981.

OMB CONTROL No.: 1903-0069.

[46 FR 43654, Aug. 31, 1981, as amended at 46 FR 63209, Dec. 31, 1981]

Subparts E—H—[Reserved]

Subpart I—Prenotification and Reporting

§ 212.126 Reports.

(a)—(c) [Reserved]

(d)(1) *Resubmissions and refiling of reports by refiners.* A refiner shall exercise due care and diligence in the preparation of cost allocation reports filed pursuant to this section. DOE will routinely accept resubmissions or refiling of such reports only within one year after the original filing or submission. Any entry contained in an otherwise timely report which purports to change or adjust retroactively an entry or allocation contained in a report previously filed or submitted shall be considered a refiling or resubmission for purposes of this paragraph and will not be given force or effect absent compliance with the provisions of this paragraph.

(2) *Exceptions.* Notwithstanding the provisions of paragraph (d)(1) of this section, a refiner may resubmit or refile reports until June 1, 1979, for months of measurement beginning with September 1973; where expressly authorized by DOE regulation or order; or where DOE grants written permission to resubmit or refile for good cause shown.

(3) *Applications to resubmit or refile.* In any application for permission to

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resubmit or refile a report pursuant to paragraph (d)(2) of this section, DOE will not make a finding of good cause routinely. Where it appears that such a finding may adversely affect the interest of the consuming public, a firm must demonstrate in its application, at a minimum, that the claimed errors or omissions in the report or reports which the firm seeks to replace or modify did not result from a failure to exercise due care and diligence. Firms must apply for permission pursuant to paragraph (d)(2) of this section, in writing, to the DOE Office of Special Counsel for Compliance or Office of Enforcement, as appropriate. Applications to resubmit or refile must be accompanied by a written statement completely describing the proposed adjustments and the reasons therefor, and a numerical schedule which reflects both the previously submitted figures and the proposed adjusted figures. The appropriate DOE Office will dispose of each application in writing, with a concise statement of the reasons for granting or denying the application. The disposition of such an application shall be subject to appeal as an order under Subpart H of Part 205.

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, Pub. L. 95-91; E.O. 12009, 42 FR 46267)

[39 FR 1949, Jan. 15, 1974, as amended at 39 FR 7582, Feb. 27, 1974; 44 FR 14536, Mar. 13, 1979; 46 FR 20516, Apr. 3, 1981]

§ 212.127 Manner of reporting.

(a) Each report required under § 212.126 of this section shall be made by the parent in accordance with forms and instructions issued by the DOE.

(b) In filing reports pursuant to § 212.126, a parent shall submit data jointly for itself and its consolidated entities and separately for each unconsolidated entity having \$10 million or more in annual sales or revenues.

[39 FR 1949, Jan. 15, 1974]

APPENDIX A TO PART 212—STANDBY REGULATIONS

STANDBY REGULATION 212-1—MANDATORY ALLOCATED CRUDE OIL PRICING RULES

1. *Scope.* This Standby Regulation sets forth the rules for pricing of crude oil subject to the DOE's Standby Mandatory Crude Oil Allocation and Refinery Yield Control Programs.

2. *Applicability.* (a) This Standby Regulation is effective beginning on the day when Standby Regulation 211-1 becomes effective pursuant to paragraph 2(a) thereof.

(b) If the exemption in paragraph 3(a) of Standby Regulation 211-1 is applicable, the provisions in § 212.94 of this Part that were in effect on January 27, 1981 shall apply to sales of crude oil pursuant to Standby Regulation 211-1 to small refiners whose DOE certified crude oil refining capacity is 50,000 barrels per day or less. With respect to sales of crude oil pursuant to Standby Regulation 211-1 to refiners whose DOE certified refining capacity is greater than 50,000 barrels per day but less than 175,000 barrels per day, the Administrator may determine that either the provisions in section 212.94 of this Part that were in effect on January 27, 1981 or the provisions in this Standby Regulation shall apply.

(c) This Standby Regulation terminates when Standby Regulation 211-1 terminates.

3. (a) *Definitions.* For the purpose of this Standby Regulation all terms shall have the same meaning as they had for the provisions of 10 CFR section 211.65 that were in effect on January 27, 1981, except for the following terms:

"Administrator" means the Administrator of the Economic Regulatory Administration, Department of Energy.

"Allocation period" means a calendar month, except as otherwise ordered by the Administrator.

"Domestic crude oil" means crude oil produced in the United States or from the "Outer Continental Shelf" as defined in 43 U.S.C. section 1331, but excluding crude oil stored in, or owned and controlled by the United States Government, in connection with the Strategic Petroleum Reserve.

"High sulfur crude oil" means crude oil the sulfur content of which is equal to or greater than 0.6% (six-tenths of one percent) by weight.

"Imported crude oil" means crude oil brought into the United States from a foreign country for consumption within the United States, but excluding crude oil stored in, or owned and controlled by the United States Government, in connection with the Strategic Petroleum Reserve.

"Low sulfur crude oil" means crude oil the sulfur content of which is less than 0.6% (six-tenths of one percent) by weight.

"Transportation expenses" means pipeline tariffs, water transportation and terminaling costs, exchange differentials, insurance and taxes paid to deliver the crude oil to the buyer's refinery or to the refinery designated by the buyer for processing the crude oil.

"United States" means the several states, the District of Columbia, Puerto Rico, the territories and possessions of the United States other than the Panama Canal Zone, and the Hawaiian Free Trade Zone.

(b) *Rule.* (1) For each allocation period, the price at which low sulfur and high sulfur crude oil shall be sold when required pursuant to Standby Regulation 211-1 shall not exceed the purchase cost to the seller as specified in subparagraph (2) of this paragraph (b), plus a handling fee of 25 cents per barrel and any transportation (including exchange differential), gravity, and sulfur content adjustments as specified in subparagraphs (3) through (5), respectively of this paragraph (b).

(2) The purchase cost to sellers of crude oil offered for sale pursuant to Standby Regulation 211-1 shall be:

(i) When the buyer has a DOE certified refining capacity of more than 50,000 barrels per day, the actual cost in an arms-length transaction or the landed cost of acquiring the imported crude oil offered for sale, or the actual cost of domestic crude oil sold.

(ii) When the buyer has a DOE certified refining capacity of 50,000 barrels per day or less, the weighted average landed cost of all the seller's imported crude oil of the same sulfur content category (other than crude oil sold under paragraph (b)(2)(i) above) for the allocation period in which the sale is made, or where the seller has no purchases of imported crude oil in the month in which the sale is made, the actual cost of acquiring the domestic crude oil offered for sale.

(3) A price adjustment shall be made for transportation expenses for crude oil offered for sale pursuant to Standby Regulation 211-1 as follows:

(i) Where domestic crude oil (other than Alaskan crude oil sold to a buyer located in other than Alaska) is sold, the actual cost of transporting the domestic crude oil from:

(1) The wellhead, in the event the seller is also the producer of the crude oil so sold, or

(2) The point of purchase or exchange in the event the seller acquires the crude oil so sold pursuant to a purchase or exchange, to the buyer's refinery;

(ii) Where Alaskan crude oil is sold to a buyer located other than in Alaska, the actual cost of transporting the Alaskan

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crude oil from the point of landing to the buyer's refinery;

(iii) Where imported crude oil is sold, the actual cost of transporting the imported crude oil from the United States port of entry to the buyer's refinery.

(4) A price adjustment shall be made for gravity differential of crude oil offered for sale under Standby Regulation 211-1 that is priced under paragraph (b)(2)(ii) of this Standby Regulation by adding to or subtracting from the price three cents per barrel (or as otherwise determined by the Administrator in light of prevailing market conditions) for each degree API that the crude oil being offered for sale is above or below, respectively, the weighted average degree API of the seller's imports of crude oil of the same sulfur content category.

(5) A price adjustment shall be made for sulfur content differential of crude oil offered for sale under Standby Regulation 211-1 that is priced under paragraph (b)(2)(ii) of this Standby Regulation by adding to or subtracting from the price three cents per barrel (or as otherwise determined by the Administrator in light of prevailing market conditions) for each one tenth of one percent that the sulfur content by weight of the crude oil being offered for sale is either below or above, respectively, the percentage representing the weighted average sulfur content of the seller's imported crude oil of the same sulfur content category.

(6) For purposes of the computations set forth in subparagraphs (4) and (5) of this paragraph, crude oil imported from Canada shall not be included.

(7) Each refiner making a purchase or sale pursuant to the provisions of Standby Regulation 211-1 shall maintain records for such sales, which shall be made available to the ERA upon request, listing the volumes and types of domestic and imported crude oil bought or sold, the purchase cost as defined in subparagraph (b)(2) of this standby regulation, and the actual sales price and transportation expenses incurred in transporting the domestic or imported crude oil to the buyer's refinery.

(The recordkeeping requirements contained in paragraph 3(b)(7) of Standby Regulation 212-1 were approved by the Office of Management and Budget under control number 1903-0074)

(Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385, Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185; Department of Energy Organization Act, Pub. L. 94-91; E.O. 12009, 42 FR 46287)

[46 FR 20517, Apr. 3, 1981, as amended at 46 FR 63209, Dec. 31, 1981]

PART 215—COLLECTION OF FOREIGN OIL SUPPLY AGREEMENT INFORMATION

Sec.

215.1 Purpose.

215.2 Definitions.

215.3 Supply reports.

215.4 Production of contracts and documents.

215.5 Pricing and volume reports.

215.6 Notice of negotiations.

AUTHORITY: Emergency Petroleum Allocation Act of 1973, Pub. L. 93-519, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133 and Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, Pub. L. 93-275, as amended, Pub. L. 94-385; Energy Policy and Conservation Act, Pub. L. 94-163, as amended, Pub. L. 94-385; E.O. 11790, 39 FR 23185.

SOURCE: 42 FR 48330, Sept. 23, 1977, unless otherwise noted.

§ 215.1 Purpose.

The purpose of this part is to set forth certain requirements pursuant to section 13 of the Federal Energy Administration Act to furnish information concerning foreign crude oil supply arrangements. The authority set out in this section is not exclusive.

§ 215.2 Definitions.

As used in this subpart:

"Administrator" means the Federal Energy Administrator or his delegate.

"DOE" means the Department of Energy.

"Host government" means the government of the country in which crude oil is produced and includes any entity which it controls, directly or indirectly.

"Person" means any natural person, corporation, partnership, association, consortium, or any other entity doing business or domiciled in the U.S. and includes (a) any entity controlled directly or indirectly by such a person and (b) the interest of such a person in any joint venture, consortium or other entity to the extent of entitlement to crude oil by reason of such interest.

§ 215.3 Supply reports.

(a) Any person having the right to lift for export by virtue of any equity interest, reimbursement for services, exchange or purchase, from any country, from fields actually in production, (1) an average of 150,000 barrels per day or more of crude oil for a period of at least one year, or (2) a total of 55,000,000 barrels of crude oil for a period of less than one year, or (3) a total of 150,000,000 barrels of crude oil for the period specified in the agreement, pursuant to supply arrangements with the host government, shall report the following information.

- (1) Parties (including partners and percentage interest, where applicable).
- (2) Grade or grades available; loading terminal or terminals.
- (3) Government imposed production limits, if any.
- (4) Minimum lifting obligation and maximum lifting rights.
- (5) Details of lifting options within the above limits.
- (6) Expiration and renegotiation dates.
- (7) Price terms including terms of rebates, discounts, and number of days of credit calculated from the date of loading.
- (8) Other payments to or interests retained by the host government (i.e. taxes, royalties, and any other payment to the host government) expressed in terms of the applicable rates or payment or preemption terms, or the base to which those rates or terms are applied.
- (9) Related service or other fees and cost of providing services.
- (10) Restrictions on shipping or disposition.
- (11) Other material contract terms.

(b) Reports under this section shall be made no later than (1) 60 days after final issuance of reporting forms implementing this regulation, as announced in the *FEDERAL REGISTER*, (2) fourteen days after the date when supply arrangements are entered into, or (3) fourteen days after the initial lifting under an agreement in which the parties have tentatively concurred but not signed, whichever occurs first. Reporting shall be based on actual practice between the parties. Material changes in any item which must be re-

ported pursuant to this section shall be reported no later than 30 days after a person receives actual notice of such changes.

(c) Where reports under this section by each participant in a joint operation would be impracticable, or would result in the submission of inaccurate or misleading information, the participants acting together may designate a single participant to report on any of the rights, obligations, or limitations affecting the operation as a whole. Any such designation shall be signed by a duly authorized representative of each participant, and shall specify:

- (1) The precise rights, obligations, or limitations to be covered by the designation; and
- (2) The reasons for the designation. Such designations shall be submitted to the Assistant Administrator for International Energy Affairs, and shall take effect only upon his written approval, which may at any time be revoked.

§ 215.4 Production of contracts and documents.

Whenever the Administrator determines that certain foreign crude oil supply information is necessary to assist in the formulation of energy policy or to carry out any other function of the Administrator, he may require the production by any person of any agreement or document relating to foreign oil supply arrangements or reports related thereto. Such material shall be provided pursuant to the conditions prescribed by the Administrator at the time of such order or subsequently. As used in this section, the term "agreement" includes proposed or draft agreements, and agreements in which the parties have tentatively concurred but have not yet signed, between or among persons and a host country.

§ 215.5 Pricing and volume reports.

To the extent not reported pursuant to § 215.3, any person lifting for export crude oil from a country shall report to the DOE within 30 days of the date on which he receives actual notice:

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(a) Any change (including changes in the timing of collection) by the host government in official selling prices, royalties, host government taxes, service fees, quality or port differentials, or any other payments made directly or indirectly for crude oil; changes in participation ratios; changes in concessionary arrangements; and

(b) Any changes in restrictions on lifting, production, or disposition.

§ 215.6 Notice of negotiations.

Any person conducting negotiations with a host government which may reasonably lead to the establishment of any supply arrangement subject to reporting pursuant to § 215.3(a), or may reasonably have a significant effect on the terms and conditions of an arrangement subject to § 215.3(a), shall notify DOE of such negotiations. Such notice shall be made no later than the later of 30 days after the effective date of this regulation or within 14 days after such negotiations meet the conditions of this section, and shall specify all persons involved and the host government affected. Notice must be in writing to the Assistant Administrator for International Energy Affairs. Where this notice pertains to negotiations to modify a supply agreement previously reported to the Department of Energy under this Part, such notice shall include the agreement serial number assigned to the basic agreement.

PART 216—MATERIALS ALLOCATION AND PRIORITY PERFORMANCE UNDER CONTRACTS OR ORDERS TO MAXIMIZE DOMESTIC ENERGY SUPPLIES

Sec.

- 216.1 Introduction.
- 216.2 Definitions.
- 216.3 Requests for assistance.
- 216.4 Evaluation by DOE of applications.
- 216.5 Notification of findings.
- 216.6 Petition for reconsideration.
- 216.7 Conflict in priority orders.
- 216.8 Communications.
- 216.9 Violations.

AUTHORITY: Sec. 104, Energy Policy and Conservation Act (EPCA); sec. 101(c), Defense Production Act of 1950, as amended (DPA) (50 U.S.C. App. 2071(c)); sec. 7, E.O. 11912, Apr. 13, 1976; Defense Mobilization

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Order No. 13, Sept. 22, 1976, 41 FR 43720; Department of Commerce, Bureau of Domestic Commerce, Delegation No. 4, 41 FR 52331.

SOURCE: 43 FR 6212, Feb. 14, 1978, unless otherwise noted.

§ 216.1 Introduction.

(a) This part describes and establishes the procedures to be used by the Department of Energy ("DOE") in considering and making certain findings required by section 101(c)(3) of the Defense Production Act of 1950, as amended, 50 U.S.C. App. 2071(c)(3) ("DPA"). Section 101(c) authorizes the allocation of, or priority performance under contracts or orders (other than contracts of employment) relating to, supplies of materials and equipment in order to maximize domestic energy supplies if the findings described in section 101(c)(3) are made. Among these findings are that such supplies of materials and equipment are critical and essential to maintain or further exploration, production, refining, transportation or the conservation of energy supplies or for the construction and maintenance of energy facilities. The function of finding if such supplies are critical and essential was delegated to the Administrator of the Department of Energy ("DOE") pursuant to Executive Order 11912 of April 13, 1976, Defense Mobilization Order ("DMO") No. 13 dated September 22, 1976, 41 FR 43720, and Department of Commerce, Bureau of Domestic Commerce, Delegation No. 4, effective date December 1, 1976, 41 FR 52331. On October 1, 1977, pursuant to section 301(a) of the Department of Energy Organization Act (Pub. L. 95-91), all of the functions of DOE and all of the functions of the DOE Administrator were transferred to the Secretary of Energy.

(b) The purpose of these regulations is to establish the procedures and the criteria to be used by DOE in determining whether programs or projects maximize domestic energy supplies and finding whether or not supplies of material and equipment are critical and essential, as required by DPA section 101(c)(3). The critical and essential finding will be made only for supplies of materials and equipment relat-

ed to those programs or projects determined by DOE to maximize domestic energy supplies. These regulations do not require or imply that the findings, on which the exercise of such authority is conditioned, will be made in any particular case.

(c) If DOE determines that a program or project maximizes domestic energy supplies and finds that supplies of materials and equipment are critical and essential to maintain or further the exploration, production, refining, transportation or conservation of energy supplies or for the construction and maintenance of energy facilities, such determination and finding will be communicated to the Department of Commerce. If not, the applicant will be so informed. If the determination and finding described above are made, the Department of Commerce, pursuant to DPA section 101(c), Executive Order 11912 and DMO No. 13, will find whether or not (1) the supplies of materials and equipment in question are scarce and (2) maintenance or furtherance of exploration, production, refining, transportation, or conservation of energy supplies or the construction and maintenance of energy facilities cannot be reasonably accomplished without exercising the authority specified in section 101(c). If these additional two findings are made, the Department of Commerce will notify DOE, and DOE will inform the applicant that it has been granted the right to use priority ratings under the Defense Materials System ("DMS") and the Defense Priorities System ("DPS") established by the Department of Commerce.

§ 216.2 Definitions.

As used in these regulations:

(a) "Secretary" means the Secretary of the Department of Energy.

(b) "Applicant" means a person requesting priorities or allocation assistance in connection with an energy program or project.

(c) "Application" means the written request of an applicant for assistance.

(d) "Assistance" means use of the authority vested in the President by DPA section 101(c) to implement priorities and allocation support.

(e) "BDC" means the Bureau of Domestic Commerce within the Domestic and International Business Administration of the United States Department of Commerce.

(f) "DOE" means the Department of Energy, acting through the Secretary or the delegate of the Secretary.

(g) "Eligible energy program or project" means a designated activity which maximizes domestic energy supplies by furthering the domestic exploration, production, refining, transportation or conservation of energy supplies or construction and maintenance of energy facilities within the meaning of DPA section 101(c), as determined by DOE.

(h) "FPA" means the Federal Preparedness Agency of the General Services Administration.

(i) "Materials and equipment" means any raw, in-process, or manufactured commodity, equipment, component, accessory, part, assembly or product of any kind.

(j) "Person" means an individual, corporation, partnership, association, or any other organized group of persons (or legal successor or representative thereof), and includes the United States or any other government and any political subdivisions (or any agency) thereof.

§ 216.3 Requests for assistance.

(a) Persons who believe that they perform work associated with a program or project which may qualify as an eligible energy program or project and wishing to receive assistance as authorized by DPA section 101(c)(1) may submit an application to DOE requesting DOE to determine whether a program or project maximizes domestic energy supplies and to find whether or not specific supplies of materials or equipment identified in the application are critical and essential for a purpose identified in section 101(c). The application should be sent to: Department of Energy, Office of Financial Planning and Materials Allocation, Office of Resource Applications, Room 3516, Federal Building, 12th and Pennsylvania Avenue NW., Washington, D.C. 20461. The application

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shall contain the following information:

(1) The name and address of the applicant and of its duly authorized representative.

(2) A description of the energy program or project for which assistance is requested and an assessment of its impact on the maximization of domestic energy supplies.

(3) The amount of energy to be produced by the program or project which is directly affected by the supplies of the materials or equipment in question.

(4) A statement explaining why the materials or equipment for which assistance is requested are critical and essential to the construction or operation of the energy project or program.

(5) A detailed description of the specific supplies of materials and equipment in connection with which assistance is requested, including: Components, performance data (capacity, life duration, etc.), standards, acceptable tolerances in dimensions and specifications, current inventory, present and expected rates of use, anticipated deliveries and substitution possibilities (feasibility of using other materials or equipment).

(6) A detailed description of the sources of supply, including: Name of the regular supplying company or companies, other companies capable of supplying the materials and equipment, location of supplying plants or plants capable of supplying the needed materials and equipment, possible suppliers for identical or substitutable materials and equipment and possible foreign sources of supply.

(7) A detailed description of the delivery situation, including: Normal delivery times, promised delivery time without priorities assistance, and delivery time required for expeditious fulfillment or completion of the program or project.

(8) Evidence of the applicant's unsuccessful efforts to obtain on a timely basis the materials and equipment in question through normal business channels from current or other known suppliers.

(9) A detailed estimate of the delay in fulfilling or completing the energy

program or project which will be caused by inability to obtain the specified materials and equipment in the usual course of business.

(10) Any known conflicts with rated or authorized controlled material orders already issued pursuant to the DPA for supplies of the described materials and equipment.

(11) Quarterly estimates of requirements for controlled materials, if applicable, by shapes and forms as prescribed by DMS Regulation 1.

(b) DOE, in consultation with the BDC, may prescribe standard forms of application or letters of instruction for use by all persons seeking assistance.

(c) In addition to the information described above, DOE may from time to time request whatever additional information it reasonably believes is relevant to the discharge of its functions pursuant to DPA section 101(c).

§ 216.4 Evaluation by DOE of applications.

(a) Based on the information provided by the applicant and other available information, DOE will assess the application and (1) determine whether or not the energy program or project in connection with which the application is made maximizes domestic energy supplies and should be designated an eligible energy program or project and (2) find whether the described supplies of materials and equipment are critical and essential to the eligible energy program or project.

(b) In determining whether the program or project referred to in the application should be designated an eligible energy program or project, DOE will consider all factors which it considers relevant including, but not limited to, the following:

(1) Quantity of energy involved;

(2) Benefits of timely energy program furtherance or project completion;

(3) Socioeconomic impact;

(4) The need for the end product for which the materials and equipment are allegedly required; and

(5) Established national energy policies.

(c) In findings whether the supplies of materials or equipment described in

the application are critical and essential to an eligible energy program or project, DOE will consider all factors which it considers relevant including, but not limited to, the following:

(1) Availability and utility of substitute materials or equipment; and

(2) Impact of the nonavailability of the specific supplies of materials and equipment on the furtherance or timely completion of the approved energy program or project.

(d) Increased costs which may be associated with obtaining materials or equipment without assistance shall not be considered a valid reason for denying the materials and equipment to be critical and essential.

(e) After DOE has determined a program or project to be an eligible energy program or project, this determination shall be deemed made with regard to subsequent applications involving the same program or project unless and until DOE announces otherwise.

§ 216.5 Notification of findings.

(a) DOE will notify the BDC if it finds that supplies of materials and equipment, for which an applicant requested assistance, are critical and essential to an eligible energy program or project, and in such cases will forward to the BDC the application and whatever information or comments DOE believes appropriate. If DOE believes at any time that findings previously made may no longer be valid, it will immediately notify the BDC and the affected applicant(s) and afford each applicant(s) an opportunity to show cause why such findings should not be withdrawn.

(b) If BDC notifies DOE that BDC has found that supplies of materials and equipment, for which the applicant requested assistance, are scarce and that the related eligible energy program or project cannot reasonably be accomplished without exercising the authority specified in DPA section 101(c)(1), DOE will notify the applicant that the applicant is authorized to place rated orders and/or authorized controlled material orders for specific supplies of materials and equipment pursuant to the provisions of FPMR Regulation 1 and DPS Regulation

1, as promulgated by the Department of Commerce.

§ 216.6 Petition for reconsideration.

If DOE, after evaluating an application in accordance with § 216.4, does not determine that the energy program or project maximizes domestic energy supplies or does not find that the supplies of materials and equipment described in the application are critical and essential to an eligible energy program or project, it will so notify the applicant and the applicant may petition DOE for reconsideration. If DOE concludes at any time that findings previously made are no longer valid and should be withdrawn, DOE will so notify the affected applicant(s), and such applicant(s) may petition DOE for reconsideration of the withdrawal decision. Such a petition is deemed accepted when received by DOE at the address stated in § 216.9. DOE will consider the petition for reconsideration and either grant or deny the relief requested. Written notice of the decision and of the reasons for the decision will be provided to the applicant. There has not been an exhaustion of administrative remedies until a petition for reconsideration has been submitted and the review procedure completed by grant or denial of the relief requested. The denial of relief requested in a petition for reconsideration is a final administrative decision.

§ 216.7 Conflict in priority orders.

If it appears that the use of assistance pursuant to DPA section 101(c) creates or threatens to create a conflict with priorities and allocation support provided in connection with the national defense pursuant to DPA section 101(a), DOE will work with the BDC and other claimant agencies affected by such conflict in an attempt to reschedule deliveries or otherwise accommodate such competing demands. If acceptable solutions cannot be agreed upon by the claimant agencies the FPA will resolve such conflicts.

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§ 216.8 Communications.

All written communications concerning these regulations shall be addressed to:

Department of Energy, Financial Planning and Materials Allocation, Office of Resource Applications, Room 3516, Federal Building, 12th and Pennsylvania Avenue NW., Washington, D.C. 20461.

§ 216.9 Violations.

Any person who willfully furnishes false information or conceals any material fact in the course of the application process or in a petition for reconsideration is guilty of a crime, and upon conviction may be punished by fine or imprisonment or both.

PART 218—STANDBY MANDATORY INTERNATIONAL OIL ALLOCATION

Subpart A—General Provisions

Sec.

- 218.1 Purpose and scope.
- 218.2 Activation/Deactivation.
- 218.3 Definitions.

Subpart B—Supply Orders

- 218.10 Rule.
- 218.11 Supply orders.
- 218.12 Pricing.

Subpart C—[Reserved]

Subpart D—Procedures

- 218.30 Purpose and scope.
- 218.31 Incorporated procedures.
- 218.32 Review.
- 218.33 Stay.
- 218.34 Addresses.

Subpart E—Investigations, Violations, Sanctions and Judicial Actions

- 218.40 Investigations.
- 218.41 Violations.
- 218.42 Sanctions.
- 218.43 Injunctions.

AUTHORITY: Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163, as amended, Pub. L. 94-385, and Pub. L. 95-70; De-

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partment of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: 44 FR 27972, May 14, 1979, unless otherwise noted.

Subpart A—General Provisions

§ 218.1 Purpose and scope.

(a) This part implements section 251 of the Energy Policy and Conservation Act (Pub. L. 94-163) (42 U.S.C. 6271), as amended, which authorizes the President to take such action as he determines to be necessary for performance of the obligations of the United States under Chapters III and IV of the Agreement on an International Energy Program (TIAS 8278), insofar as such obligations relate to the mandatory international allocation of oil by International Energy Program participating countries.

(b) **Applicability.** This part applies to any firm engaged in producing, transporting, refining, distributing or storing oil which is subject to the jurisdiction of the United States.

§ 218.2 Activation/Deactivation.

(a) This rule shall take effect providing:

(1) The International Energy Program has been activated; and,

(2) The President has transmitted this rule to Congress, has found putting such rule into effect is required in order to fulfill obligations of the United States under the International Energy Program and has transmitted such a finding to the Congress together with a statement of the effective date and manner for exercise of such rule.

(b) This rule shall revert to standby status no later than 60 days after the deactivation of the emergency allocation system activated to implement the International Energy Program.

§ 218.3 Definitions.

“DOE” means the Department of Energy established by the Department of Energy Organization Act (Pub. L. 95-91), and includes the Secretary of Energy or his delegate.

"EPCA" means the Energy Policy and Conservation Act (Pub. L. 94-163), as amended.

"Firm" means any association, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship or any other entity however organized including charitable, educational, or other eleemosynary institutions, and the Federal Government including corporations, departments, Federal agencies, and other instrumentalities, and State and local governments. The ERA may, in regulations and forms issued in this part, treat as a firm: (a) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls, (b) a parent and its consolidated entities, (c) an unconsolidated entity, or (d) any part of a firm.

"IEA" means the International Energy Agency established to implement the IEP.

"IEP" means the International Energy Program established pursuant to the Agreement on an International Energy Program signed at Paris, France, on November 18, 1974, including (a) the Annex entitled "Emergency Reserves", (b) any amendment to such Agreement that includes another nation as a Party to such Agreement, and (c) any technical or clerical amendment to such Agreement.

"International energy supply emergency" means any period (a) beginning on any date that the President determines allocation of petroleum products to nations participating in the IEP is required by Chapters III and IV of the IEP and (b) ending on a date on which he determines such allocation is no longer required.

"Oil" means crude oil, residual fuel oil, unfinished oil, refined petroleum product and natural gas liquids, which is owned or controlled by a firm, including any petroleum product destined, directly or indirectly, for import into the United States or any foreign country, or produced in the United States but excludes any oil stored in or owned and controlled by the United States Government in connection with the Strategic Petroleum Reserve authorized in section 151, *et seq.*, of the Energy Policy and Conservation Act (Pub. L. 94-163).

"Person" means any individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a charitable, educational or other institution, and includes any officer, director, owner or duly authorized representative thereof.

"Supply order" means a written directive or a verbal communication of a written directive, if promptly confirmed in writing, issued by the DOE pursuant to Subpart B of this part.

"United States" when used in the geographic sense means the several States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States, and the outer continental shelf as defined in 43 U.S.C. 1331.

Subpart B—Supply Orders

§ 218.10 Rule.

(a) Upon the determination by the President that an international energy supply emergency exists, firms engaged in producing, transporting, refining, distributing, or storing oil shall take such actions as are determined by the DOE to be necessary for implementation of the obligations of the United States under Chapters III and IV of the IEP that relate to the mandatory international allocation of oil by IEP participating countries.

(b) Any actions required in accordance with paragraph (a) of this section shall be stated in supply orders issued by DOE.

(c) No firm to which a supply order is issued shall be required to comply with such order unless the firm to which the oil is to be provided in accordance with such supply order has agreed to a procedure for the resolution of any dispute related to the terms and conditions of the sale undertaken pursuant to the supply order. The means for resolving any such disputes may include any procedures that are mutually acceptable to the parties, including arbitration before the IEA if the IEA has established arbitration procedures, arbitration or adjudication before an appro-

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prate body, or any other similar procedure.

§ 218.11 Supply orders.

(a) A supply order shall require that the firm to which it is issued take actions specified therein relating to supplying the stated volume of oil to a specified recipient including, but not limited to, distributing, producing, storing, transporting or refining oil. A supply order shall include a concise statement of the pertinent facts and of the legal basis on which it is issued, and shall describe the action to be taken.

(b) The DOE shall serve a copy of the supply order on the firm directed to act as stated therein.

(c) The DOE may modify or rescind a supply order on its own motion or pursuant to an application filed in accordance with § 218.32 of this part.

(d) A supply order shall be effective in accordance with its terms, and when served upon a firm directed to act thereunder, except that a supply order shall not remain in effect (1) upon reversion of this rule to Standby status or (2) twelve months after the rule has been transmitted to Congress (which ever occurs first) or (3) to the extent that DOE or a court of competent jurisdiction directs that it be stayed, modified, or rescinded.

(e) Any firm issued a supply order pursuant to this subpart may seek modification or rescission of the supply order in accordance with procedures provided in § 218.32 of this part.

§ 218.12 Pricing.

The price for oil subject to a supply order issued pursuant to this subpart shall be based on the price conditions prevailing for comparable commercial transactions at the time the supply order is served.

Subpart C—[Reserved]

Subpart D—Procedures

§ 218.30 Purpose and scope.

This subpart establishes the administrative procedures applicable to supply orders. They shall be exclusive of any other procedures contained in

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this chapter, unless such other procedures are specifically made applicable hereto by this subpart.

§ 218.31 Incorporated procedures.

The following subparts of Part 205 of this chapter are, as appropriate, hereby made applicable to this part:

(a) *Subpart A—General Provisions*; *Provided*, that § 205.11 shall not apply; *and Provided further*, that in addition to the methods of service specified in § 205.7 of this chapter, service shall be effective if a supply order is transmitted by telex, telecopies or other similar means of electronic transmission of a writing and received by the firm to which the supply order is addressed.

(b) *Subpart F—Interpretation*.

(c) *Subpart K—Rulings*.

(d) *Subpart M—Conferences, Hearings and Public Hearings*.

§ 218.32 Review.

(a) *Purpose and scope*. This subpart establishes the procedures for the filing of an application for review of a supply order. An application for review is a summary proceeding which will be initiated only if the criteria described in paragraph (g)(2) of this section are satisfied.

(b) *What to file*. (1) A firm filing under this subpart shall file an "Application for Review" which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the firm filing the application. The applicant shall comply with the general filing requirements stated in 10 CFR 205.9 in addition to the requirements stated in this section.

(2) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted under this subpart, the procedures set out in 10 CFR 205.9(f) shall apply.

(c) *When to file*. An application for review should be filed no later than 5 days after the receipt by the applicant of the supply order that is the subject of the application, or no later than 2 days after the occurrence of an event that results in a substantial change in

the facts or circumstances affecting the applicant.

(d) *Where to file.* The application for review shall be filed with DOE Office of Hearings and Appeals (OHA), 2000 M Street, NW., Washington, D.C. 20461.

(e) *Notice.* The applicant shall send by United States mail or deliver by hand a copy of the application and any subsequent amendments or other documents relating to the application to the Administrator of the Economic Regulatory Administration of DOE, 2000 M Street, NW., Washington, D.C. 20461. Service shall be made on the ERA at same time the document is filed with OHA and each document filed with the OHA shall include certification that the applicant has complied with the requirements of this paragraph.

(f) *Contents.* (1) The application shall contain a full and complete statement of all relevant facts pertaining to the application and to the DOE action sought. Such facts shall include a complete statement of the business or other reasons that justify review of the supply order and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted with the application. A copy of the order of which review is sought shall be included with the application. When the application pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction shall be submitted.

(2) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE and DOE rulings, regulations, interpretations and decisions on appeal and exception relied upon to support the action sought therein.

(g) *DOE evaluation—(1) Processing.*

(i) The DOE may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The DOE may solicit and accept submissions from third parties relevant to any application for review

provided that the applicant is afforded an opportunity to respond to all third party submissions. In evaluating an application for review, the DOE may convene a conference, on its own initiative, if, in its discretion, it considers that a conference will advance its evaluation of the application.

(ii) If the DOE determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, the DOE may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the DOE may dismiss the application with prejudice. If the applicant fails to provide the notice required by paragraph (e) of this section, the DOE may dismiss the application without prejudice.

(iii) An order dismissing an application for any of the reasons specified in paragraph (g)(1)(ii) of this section shall contain a statement of the grounds for the dismissal. The order shall become final within 5 days of its service upon the applicant, unless within such 5-day period the applicant files an amendment correcting the deficiencies identified in the order. Within 5 days of the filing of such amendment, the DOE shall notify the applicant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies specified in the order, the order shall become a final order of the DOE of which the applicant may seek judicial review.

(2) An application for review of an order shall be processed only if the applicant demonstrates that—

(i) There is probable cause to believe that the supply order is erroneous, inequitable, or unduly burdensome, or

(ii) There has been discovered a law, regulation, interpretation, ruling, order or decision that was in effect at the time of the application which, if it had been made known to the DOE, would have been relevant to the supply order and would have substantially altered the supply order; or

(iii) There has been a substantial change in the facts or circumstances affecting the applicant, which change has occurred during the interval be-

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tween issuance of the supply order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

(h) *Decision.* (1) Upon consideration of the application and other relevant information received or obtained during the proceeding, the DOE shall issue an order granting or denying the modification or rescission of the supply order requested in the application for review.

(2) The DOE shall process applications for review as expeditiously as possible. When administratively feasible, the DOE shall issue an order granting or denying the application within 20 business days after receipt of the application.

(3) The order shall include a written statement setting forth the relevant facts and the legal basis of the order. The order shall state that it is a final order of which the applicant may seek judicial review.

(4) The DOE shall serve a copy of the order upon the applicant and any other party who participated in the proceeding.

§ 218.33 Stay.

(a) The DOE may issue an order granting a stay if the DOE determines that an applicant has made a compelling showing that it would incur serious and irreparable injury unless immediate stay relief is granted pending determination of an application for review pursuant to this subpart. An application for a stay shall be labeled as such on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the firm filing the application. It shall include a description of the proceeding incident to which the stay is being sought and of the facts and circumstances which support the applicant's claim that it will incur irreparable injury unless immediate stay relief is granted. The applicant shall comply with the general filing requirements stated in 10 CFR 205.9 in addition to the requirements stated in this section. The DOE on its own initiative may also issue an order granting a stay upon a finding that a firm will incur irrepara-

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ble injury if such an order is not granted.

(b) An order granting a stay shall expire by its terms within such time after issuance, not to exceed 30 days as the DOE specifies in the order, except that it shall expire automatically 5 days following its issuance if the applicant fails within that period to file an application for review unless within that period the DOE for good cause shown, extends the time during which the applicant may file an application for review.

(c) The order granting or denying a stay is not an order of the DOE subject to administrative review.

§ 218.34 Addresses.

All correspondence, petitions, and any information required by this part shall be submitted to: Administrator, Economic Regulatory Administration, Department of Energy, 2000 M Street, NW., Washington, D.C. 20461, and to the Director, Office of Hearings and Appeals, Department of Energy, 2000 M Street, NW., Washington, D.C. 20461.

Subpart E—Investigations, Violations, Sanctions and Judicial Actions

§ 218.40 Investigations.

(a) The DOE may initiate and conduct investigations relating to the scope, nature and extent of compliance by any person with the rules, regulations or statutes of the DOE or any order promulgated by the DOE under the authority of section 251 of EPCA, or any court decree.

(b) Any duly designated and authorized representative of DOE has the authority to conduct an investigation and to take such action as he deems necessary and appropriate to the conduct of the investigation including any action pursuant to § 205.8.

(c) There are no parties, as that term is used in adjudicative proceedings, in an investigation under this subpart, and no person may intervene or participate as a matter of right in any investigation under this subpart.

(d) Any person may request the DOE to initiate an investigation pursuant to paragraph (a) of this section.

A request for an investigation shall set forth the subject matter to be investigated as fully as possible and include supporting documentation and information. No particular forms or procedures are required.

(e) Any person who is requested to furnish documentary evidence or testimony in an investigation, upon written request, shall be informed of the general purpose of the investigation.

(f) DOE shall not disclose information or documents that are obtained during any investigation unless (1) DOE directs or authorizes the public disclosure of the investigation; (2) the information or documents are a matter of public record; or (3) disclosure is not precluded by the Freedom of Information Act, 5 U.S.C. 552 and 10 CFR Part 1004.

(g) During the course of an investigation any person may submit at any time any document, statement of facts or memorandum of law for the purpose of explaining the person's position or furnish evidence which the person considers relevant to a matter under investigation.

(h) If facts disclosed by an investigation indicate that further action is unnecessary or unwarranted, the investigative file may be closed without prejudice to further investigation by the DOE at any time that circumstances so warrant.

§ 218.41 Violations.

Any practice that circumvents, contravenes or results in the circumvention or contravention of the requirements of any provision of this Part 218 or any order issued pursuant thereto is a violation of the DOE regulations stated in this part and is unlawful.

§ 218.42 Sanctions.

(a) *General.* Any person who violates any provisions of this Part 218 or any order issued pursuant thereto shall be subject to penalties and sanctions as provided herein.

(1) The provisions herein for penalties and sanctions shall be deemed cumulative and not mutually exclusive.

(2) Each day that a violation of the provisions of this Part 218 or any order issued pursuant thereto continues shall be deemed to constitute a

separate violation within the meaning of the provisions of this part relating to fines and civil penalties.

(b) *Penalties.* (1) Any person who violates any provision of Part 218 of this chapter or any order issued pursuant thereto shall be subject to a civil penalty of not more than \$5,000 for each violation.

(2) Any person who willfully violates any provision of this Part 218 or any order issued pursuant thereto shall be subject to a fine of not more than \$10,000 for each violation.

(3) Any person who knowingly and willfully violates any provision of this Part 218 or any order issued pursuant thereto with respect to the sale, offer of sale, or distribution in commerce of oil after having been subject to a civil penalty under paragraph (b) (1) or (2) of this section for a prior violation of the provisions of this Part 218 or any order issued pursuant thereto with respect to the sale, offer of sale, or distribution in commerce of oil shall be subject to a fine of not more than \$50,000 or imprisonment for not more than six months, or both, for each violation.

(4) Actions for penalties under this section are prosecuted by the Department of Justice upon referral by the DOE.

(5) When the DOE considers it to be appropriate or advisable, the DOE may compromise and settle any action under this paragraph, and collect civil penalties.

(c) *Other Penalties.* Willful concealment of material facts, or making of false, fictitious or fraudulent statements or representations, or submission of a document containing false, fictitious or fraudulent statements pertaining to matters within the scope of this Part 218 by any person shall subject such persons to the criminal penalties provided in 18 U.S.C. 1001 (1970).

§ 218.43 Injunctions.

Whenever it appears to the DOE that any firm has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any regulation or order issued under this Part 218, the DOE may request the

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Attorney General to bring a civil action in the appropriate district court of the United States to enjoin such acts or practices and, upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. The relief sought may include a mandatory injunction commanding any firm to comply with any provision of such order or regulation, the violation of which is prohibited by section 524 of the EPCA.

PART 220—STRATEGIC PETROLEUM RESERVE CRUDE OIL ALLOCATION

Subpart A—General Provisions

Sec.

220.1 Purpose and scope.

220.2 Definitions.

Subpart B—Method of Allocation

220.10 Rule.

Subpart C—Procedures for Sales of SPR Crude Oil

220.20 Basic sales agreement.

220.21 Notice of sale.

220.22 Contract awards.

Subpart D—Price Rule

220.30 Applicability.

220.31 Definitions.

220.32 Rule.

220.33 Landed cost.

AUTHORITY: Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, Pub. L. 93-159, as amended, Pub. L. 93-511, Pub. L. 94-99, Pub. L. 94-133, Pub. L. 94-163, and Pub. L. 94-385; Federal Energy Administration Act of 1974, 15 U.S.C. 787 *et seq.*, Pub. L. 93-275, as amended, Pub. L. 94-332, Pub. L. 94-385, Pub. L. 95-70, and Pub. L. 95-91; Energy Policy and Conservation Act, 42 U.S.C. 6201 *et seq.*, Pub. L. 94-163 as amended, Pub. L. 94-385, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267.

SOURCE: 45 FR 55379, Aug. 19, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 220.1 Purpose and scope.

(a) This part implements section 161(e) of the Energy Policy and Conservation Act (Pub. L. 94-163) (42

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U.S.C. 6231), as amended, which authorizes the Secretary of Energy to provide for the allocation of any petroleum product withdrawn from the Strategic Petroleum Reserve.

(b) *Applicability.* This part applies to any allocation of SPR crude oil, other than distribution by price competition, whether or not conducted pursuant to Standby Regulation 211-1 in Part 211 (Standby Mandatory Crude Oil Allocation and Refinery Yield Control Programs), or this part.

[45 FR 55379, Aug. 19, 1980, as amended at 46 FR 20518, Apr. 3, 1981]

§ 220.2 Definitions.

"Basic Sales Agreement" means a document issued by DOE containing many of the terms and conditions of any contract which may be awarded for the purchase of SPR crude oil from the Government.

"DOE" means the Department of Energy established by the Department of Energy Organization Act (Pub. L. 95-91), and includes the Secretary of DOE or his delegate.

"Notice of sale" means the document issued by DOE announcing the sale of SPR crude oil. The Notice of Sale will specify the method of sale, eligibility to purchase, prices, applicable terminalling, handling and transportation charges, the crude oil types and quantities available for purchase, the sales period, delivery location(s), minimum and maximum volume restrictions, place and date for submission of offers, modes of transportation applicable for each delivery point (i.e., pipeline, barge, tanker and applicable port data/restrictions), special terms and conditions of sale, and the criteria to be employed in evaluating offers to purchase.

"Strategic Petroleum Reserve (SPR)" means the program for the storage of crude oil and/or petroleum products authorized by Title I, Part B of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6231 *et seq.*

"SPR crude oil" means crude oil stored in or acquired for storage in the SPR, or for the distribution thereof. For the purposes of Subpart C, Part 211 of this chapter, such crude oil

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shall be considered as imported crude oil.

[45 FR 55379, Aug. 19, 1980, as amended at 46 FR 20518, Apr. 3, 1981]

Subpart B—Method of Allocation

§ 220.10 Rule.

(a) Upon a determination by the President that implementation of the Distribution Plan contained in the Strategic Petroleum Reserve Plan is required by a severe energy supply interruption or by obligations of the United States under the International Energy Program, the Secretary may allocate, in a manner consistent with the objectives of section 4(b)(1) of the Emergency Petroleum Allocation Act of 1973, in such amounts as he shall determine: (1) Pursuant to the provisions of Standby Regulation 211-1 in Part 211 (standby Mandatory Crude Oil Allocation and Refinery Yield Control Programs) of this chapter, or (2) to any refiner, in accordance with criteria announced in a Notice of Sale.

(b) No volumes of SPR crude oil sold to any firm pursuant to paragraph (a)(3) of this section shall be sold or otherwise disposed of by such firm except pursuant to (1) crude oil exchanges in which only quality and location differentials are given effect in the calculation of the exchange ratio or (2) matching purchase and sale transactions which have the same effect as an exchange described in paragraph (b)(1) of this section.

[45 FR 55379, Aug. 19, 1980, as amended at 46 FR 20518, Apr. 3, 1981]

Subpart C—Procedures for Sale of SPR Crude Oil

§ 220.20 Basic sales agreement.

SPR crude oil will be sold only to refiners which have executed a Basic Sales Agreement by the deadlines announced in the Notice of Sale for submission of offers.

§ 220.21 Notice of sale.

SPR crude oil sales will be announced in a Notice of Sale.

§ 220.22 Contract awards.

Recipients of SPR crude oil will be selected from among those refiners offering to buy SPR crude oil, on the basis of the criteria announced in the Notice of Sale. The basis for the selection of recipients thereafter will be documented.

Subpart D—Price Rule

§ 220.30 Applicability.

The price rule stated in this subpart shall apply to any sale of SPR crude oil pursuant to Standby Regulation 211-1 in Part 211 of this chapter, or this part.

[46 FR 20518, Apr. 3, 1981]

§ 220.31 Definitions.

For purposes of this subpart—

“High sulfur crude oil” means crude oil the sulfur content of which is equal to or greater than 0.6% (six-tenths of one percent) by weight.

“Low sulfur crude oil” means crude oil the sulfur content of which is less than 0.6% (six-tenths of one percent) by weight.

“Imported crude oil” means crude oil brought into the United States from a foreign country for consumption within the United States, but excluding crude oil stored in, or owned and controlled by the United States Government in connection with the SPR.

“United States” means the several states, the District of Columbia, Puerto Rico and the territories and possessions of the United States.

§ 220.32 Rule.

(a) DOE shall establish the price at which low sulfur SPR crude oil and high sulfur SPR crude oil shall be sold, plus any gravity, and sulfur content adjustments as specified in paragraphs (b) and (c), respectively, of this section. The sale prices of SPR crude oils shall not be significantly higher or significantly lower than the highest and lowest prices, respectively, in comparable sales of allocated crude oil in the month of sale, should such sales occur. In determining the prices of

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SPR crude oils, the DOE shall consider:

(i) The weighted average per barrel landed cost (as defined in § 220.33) for all low sulfur crude oil and for high sulfur imported crude oil delivered to all U.S. refiners in the month of sale;

(ii) The data on the Transfer Pricing Report ERA-51 (or any successor to this form), wherein refiners report crude oil prices obtained in transactions between affiliated entities and in transactions between nonaffiliated entities; and

(iii) Other data that the DOE considers to be appropriate for price determination purposes.

(b) A price adjustment shall be made for gravity differentials of SPR crude oil offered for sale by adding to or subtracting from the price determined under paragraph (a) of this section an amount per barrel fixed monthly by the DOE for each degree API that the crude oil being offered for sale is above or below, respectively, the weighted average degree API of the reference crude oil of the same sulfur content category, established monthly by the DOE.

(c) A further price adjustment shall be made for sulfur content differentials of SPR crude oil offered for sale by adding to or subtracting from the price determined under paragraph (a) of this section an amount per barrel fixed monthly by the DOE for each one tenth of one percent that the sulfur content by weight of the SPR crude oil being offered for sale is either below or above, respectively, the percentage representing the sulfur content of the reference crude oil of the same sulfur content category established monthly by the DOE.

[45 FR 55379, Aug. 19, 1980, as amended at 46 FR 20518, Apr. 3, 1981]

§ 220.33 Landed cost.

(a) For purposes of this subpart, "landed cost" means:

(1) For purposes of crude oil purchased in an arm's-length transaction or purchased in a transaction to which paragraph (c) of this section is applicable, the purchase price (or the cost if paragraph (c) of this section is applicable) plus the cost of transportation, if any, from the point of delivery to

the firm to the U.S. port of entry (or the actual cost of transportation to the U.S. border in the case of crude oil not transported by sea), plus the cost of domestic transportation to the refinery, plus import fees and duties incurred. For purposes of this paragraph (a)(1) of this section, the landed cost shall be considered to be incurred when the cost is recognized as having been incurred by application of the refiner's customary accounting procedures generally accepted and consistently and historically applied.

(2) For purposes of crude oil purchased in a transaction between affiliated entities (other than crude oil to which paragraph (c) of this section is applicable), the cost of crude oil f.o.b. the port of loading in the country of origin plus the cost of transportation from the port of loading in the country of origin to the U.S. port of entry (or the actual cost of transportation to the U.S. border in the case of crude oil not transported by sea), plus the cost of domestic transportation to the refinery, plus import fees and duties incurred.

(b) When delivery is taken at a point other than in the country of loading and paragraph (c) of this section is not applicable, the crude oil shall be treated as though the crude oil has been shipped to the U.S. port of entry from the country of origin of the crude oil, on the route and in the class of vessels most commonly used by the firm and its affiliated entities for shipments between the country of origin and the U.S. port.

(c) A refiner's cost of crude oil which is purchased from unaffiliated entities and which is produced in a country from which the refiner and its affiliated entities lift no equity crude or do not otherwise receive crude on a preferential basis shall be the price paid to the unaffiliated entities, plus the cost of brokerage or other services, if any, provided to the refiner by the affiliated entities.

[46 FR 20518, Apr. 3, 1981]

**PART 221—PRIORITY SUPPLY OF
CRUDE OIL AND PETROLEUM
PRODUCTS TO THE DEPARTMENT
OF DEFENSE UNDER THE DEFENSE
PRODUCTION ACT**

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Subpart B—Exclusions

- 221.11 Natural gas and ethane.

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- 221.21 Definitions.

**Subpart D—Administrative Procedures and
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- 221.31 Requests by DOD.
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- 221.33 Order.
- 221.34 Effect of order.
- 221.35 Contractual requirements.
- 221.36 Records and reports.
- 221.37 Violations and sanctions.

AUTHORITY: Defense Production Act, 50 U.S.C. App. 2061 *et seq.*, E.O. 10480 (18 FR 4939, Aug. 18, 1953) as amended by E.O. 12038 (43 FR 4957, Feb. 7, 1978), and E.O. 11790 (39 FR 23785, June 27, 1974).

SOURCE: 45 FR 76433, Nov. 19, 1980, unless otherwise noted.

Subpart A—General

§ 221.1 Scope.

This part sets forth the procedures to be utilized by the Economic Regulatory Administration of the Department of Energy and the Department of Defense whenever the priority supply of crude oil and petroleum products is necessary or appropriate to meet national defense needs. The procedures available in this part are intended to supplement but not to supplant other regulations of the ERA regarding the allocation of crude oil, residual fuel oil and refined petroleum products.

§ 221.2 Applicability.

This part applies to the mandatory supply of crude oil, refined petroleum products (including liquefied petroleum gases) and lubricants to the Department of Defense for its own use or

for purchases made by the Department of Defense on behalf of other Federal Government agencies.

Subpart B—Exclusions

§ 221.11 Natural gas and ethane.

The supply of natural gas and ethane are excluded from this part.

Subpart C—Definitions

§ 221.21 Definitions.

For purposes of this part—

“Directive” means an official action taken by ERA which requires a named person to take an action in accordance with its provisions.

“DOD” means the Department of Defense, including Military Departments and Defense Agencies, acting through either the Secretary of Defense or the designee of the Secretary.

“ERA” means the Economic Regulatory Administration of the Department of Energy.

“National defense” means programs for military and atomic energy production or construction, military assistance to any foreign nation, stockpiling and space, or activities directly related to any of the above.

“Person” means any individual, corporation, partnership, association or any other organized group of persons, and includes any agency of the United States Government or any other government.

“Priority-rated supply order” means any delivery order for crude oil or petroleum products issued by DOD bearing a priority rating issued by ERA under this part.

“Supplier” means any person other than the DOD which supplies, sells, transfers, or otherwise furnishes (as by consignment) crude oil or petroleum product to any other person.

**Subpart D—Administrative
Procedures and Sanctions**

§ 221.31 Requests by DOD.

(a) When DOD finds that (1) a fuel supply shortage for DOD exists or is anticipated which would have a substantial negative impact on the nation-

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al defense, and (2) the defense activity for which fuel is required cannot be postponed until after the fuel supply shortage is likely to terminate, DOD may submit a written request to ERA for the issuance to it of a priority rating for the supply of crude oil and petroleum products.

(b) Not later than the transmittal date of its request to ERA, DOD shall notify the Federal Emergency Management Agency that it has requested a priority rating from ERA.

(c) Requests from DOD shall set forth the following:

(1) The quantity and quality of crude oil or petroleum products determined by DOD to be required to meet national defense requirements;

(2) The required delivery dates;

(3) The defense-related activity and the supply location for which the crude oil or petroleum product is to be delivered;

(4) The current or most recent suppliers of the crude oil or petroleum product and the reasons, if known, why the suppliers will not supply the requested crude oil or petroleum product;

(5) The degree to which it is feasible for DOD to use an alternate product in lieu of that requested and, if such an alternative product can be used, the efforts which have been made to obtain the alternate product;

(6) The period during which the shortage of crude oil or petroleum products is expected to exist;

(7) The proposed supply source for the additional crude oil or petroleum products required, which shall, if practicable, be the historical supplier of such crude oil or product to DOD; and

(8) Certification that DOD has made each of the findings required by paragraph (a) of this section.

§ 221.32 Evaluation of DOD request.

(a) Upon receipt of a request from DOD for a priority rating as provided in § 221.31, it shall be reviewed promptly by ERA. The ERA will assess the request in terms of:

(1) The information provided under § 221.31;

(2) Whether DOD's national defense needs for crude oil or petroleum products can reasonably be satisfied with-

out exercising the authority specified in this part;

(3) The capability of the proposed supplier to supply the crude oil or petroleum product in the amounts required;

(4) The known capabilities of alternative suppliers;

(5) The feasibility to DOD of converting to and using a product other than that requested; and

(6) Any other relevant information.

(b) The ERA promptly shall notify the proposed supplier of DOD's request for a priority rating specified under this part. The proposed supplier shall have a period specified in the notice, not to exceed fifteen (15) days from the date it is notified of DOD's request, to show cause in writing why it cannot supply the requested quantity and quality of crude oil or petroleum products. ERA shall consider this information in determining whether to issue the priority rating.

(c) If acceptance by a supplier of a rated order would create a conflict with another rated order of the supplier, it shall include all pertinent information regarding such conflict in its response to the show cause order provided for in subsection (b), and ERA, in consultation with DOD and the Federal Emergency Management Agency shall determine the priorities for meeting all such requirements.

(d) ERA may waive some or all of the requirements of § 221.31 or this section where the Secretary of Defense or his designee certifies, and has so notified the Federal Emergency Management Agency, that a fuel shortage for DOD exists or is imminent and that compliance with such requirements would have a substantial negative impact on the national defense.

§ 221.33 Order.

(a) *Issuance.* If ERA determines that issuance of a priority rating for a crude oil or refined petroleum product is necessary to provide the crude oil or petroleum products needed to meet the national defense requirement established by DOD, it shall issue such a rating to DOD for delivery of specified qualities and quantities of the crude

oil or refined petroleum products on or during specified delivery dates or periods. In accordance with the terms of the order, DOD may then place such priority rating on a supply order.

(b) *Compliance.* Each person who receives a priority-rated supply order pursuant to this part shall supply the specified crude oil or petroleum products to DOD in accordance with the terms of that order.

(c) *ERA directives.* Notwithstanding any other provisions of this part, where necessary or appropriate to promote the national defense ERA is authorized to issue a directive to a supplier of crude oil or petroleum product requiring delivery of specified quantities and quantities of such crude oil or petroleum products to DOD at or during specified delivery dates or periods.

(d) *Use of ratings by suppliers.* No supplier who receives a priority-rated supply order or directive issued under the authority of this section may use such priority order or directive in order to obtain materials necessary to meet its supply obligations thereunder.

§ 221.34 Effect of order.

Defense against claims for damages. No person shall be liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any ERA authorized priority-rated supply order or ERA directive issued pursuant to this part, notwithstanding that such priority-rated supply order or directive thereafter be declared by judicial or other competent authority to be invalid.

§ 221.35 Contractual requirements.

(a) No supplier may discriminate against an order or contract on which a priority rating has been placed under this part by charging higher prices, by imposing terms and conditions for such orders or contracts different from other generally comparable orders or contracts, or by any other means.

(b) Contracts with priority ratings shall be subject to all applicable laws and regulations which govern the making of such contracts, including those specified in 10 CFR 211.26(e).

§ 221.36 Records and reports.

(a) Each person receiving an order or directive under this part shall keep for at least two years from the date of full compliance with such order or directive accurate and complete records of crude oil and petroleum product deliveries made in accordance with such order or directive.

(b) All records required to be maintained shall be made available upon request for inspection and audit by duly authorized representatives of the ERA.

(Approved by the Office of Management and Budget under control number 1903-0073)

[45 FR 76433, Nov. 19, 1980, as amended at 46 FR 63209, Dec. 31, 1981]

§ 221.37 Violations and sanctions.

(a) Any practice that circumvents or contravenes the requirements of this part or any order or directive issued under this part is a violation of the regulations provided in this part.

(b) Criminal penalties. Any person who willfully performs any act prohibited, or willfully fails to perform any act required by this part or any order or directive issued under this part shall be subject to a fine of not more than \$10,000 for each violation or imprisoned for not more than one year for each violation, or both.

(c) Whenever in the judgment of the Administrator of ERA any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of these regulations, the Administrator may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision.

APPENDIX TO SUBCHAPTER A—DOE RULINGS

- 1974-1 Prices for base period purchasers.
- 1974-2 Redirected sales pricing.
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- 1974-23 Car wash sales of gasoline.
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- 1974-26 Application of the refiner's cost formula of § 211.83(c) to refiners required to sell crude oil under the allocation program.
- 1974-27 Allocation of refiner's increased product costs to sales volumes.
- 1974-28 Inapplicability of the "stripper well lease" exemption to gas wells.
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- 1975-1 Transportation costs.
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- 1975-3 Retailing of gasoline; prospective increases in rent for real property.
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- 1975-5 Oil and gas reserves survey (Form DOE P-301-S-O); treatment of confidential information received by DOE.
- 1975-6 Natural gas liquid products; pricing prior to January 1, 1975.
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- 1975-9 Storage costs.
- 1975-10 Transportation costs where transportation is provided by the firm concerned.
- 1975-11 New and higher cost storage tanks; rentals.
- 1975-12 Stripper well lease exemption; calculation of average daily production where curtailed.
- 1975-13 Early payment percentage discounts.
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- 1975-17 Mandatory petroleum price and allocation regulations; application during September 1975.
- 1975-18 Natural gas shrinkage; computation of increased cost.
- 1976-1 Allocations with respect to newly constructed or purchased refineries under crude oil buy/sell program.
- 1976-2 Mandatory petroleum price regulations; production of "new" crude oil due to extra day in February, 1976; effect on cumulative deficiency requirement and BPCL adjustments.
- 1976-3 Naval Petroleum Reserves Act of 1976; interpretation.
- 1976-4 Synthetic fuels processed from oil shale, tar sands, and coal; inapplicability of mandatory petroleum allocation and price regulations.
- 1976-5 Retail sales outlet operator's entitlement to motor gasoline.
- 1977-1 Clarifications to mandatory petroleum price regulations applicable to domestic crude oil.
- 1977-2 Domestic crude oil; further clarifications to mandatory petroleum price regulations.
- 1977-3 Cargo sales.
- 1977-4 Interaffiliate transactions; timing of landed cost.
- 1977-5 Application of the definition of "transaction" for purposes of computing weighted average May 15, 1973, prices.
- 1977-6 Applicability of the stripper well property exemption to properties that produce both crude oil and condensate recovered in non-associated production.
- 1977-7 Post-September 1, 1976 treatment of separate reservoirs as stripper well properties.
- 1977-8 Termination of crude oil supplier/purchaser relationships by a producer.

- 1979-1 Modification of ruling 1977-5: Application of the definition of "transaction" to variable-price contracts for purposes of computing lawful weighted average May 15, 1973 prices.
- 1979-2 Redirection of Motor Gasoline.
- 1980-1 Application of test procedures to water heaters designed to utilize kerosene fuel.
- 1980-2 Allocation of motor gasoline at retail sales outlets.
- 1980-3 Clarifications to the Newly Discovered Crude Oil Ceiling Price Rule.
- 1980-4 Clarification of the definition of "operational".
- 1981-1—Questions and Answers Relating to the Effect of the Executive Order Decontrolling Crude Oil and Refined Petroleum Products on the Mandatory Petroleum Allocation and Price Regulations.
- 1981-2—Determination of Commercial Unmarketability.
- 1981-3—Application of the Mandatory Petroleum Price Regulations to Unleaded Gasoline Sales by Resellers, Reseller-Retailers, and Retailers.
- 1983-1—Questions and Answers Relating to the Applicability to the Petroleum Violation Escrow Funds of Regulations of the Energy Conservation Programs Administered by the Department of Energy To Which These Funds May Be Distributed Under Section 155 of the Further Continuing Appropriations Act, Fiscal Year 1983
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RULING 1974-1—PRICES FOR BASE PERIOD PURCHASERS

Facts. Firm C, a refiner and supplier of middle distillate fuels sells these fuels to wholesale purchasers. Under the allocation regulation specified in 10 CFR 211.124(a), Firm C must

supply those wholesale purchasers which it supplied in the base period (the month of 1972 which corresponds to the current month). Checking its records, Firm C finds that for the current month 75 percent of its present wholesale purchasers were also supplied by Firm C during the base period, but that the remaining 25 percent were not. Firm C, therefore, replaces the 25 percent of its current purchasers which were not supplied during the base period with those former purchasers to which Firm C did sell fuels during the base period.

Because these former purchasers are not now buying fuel from Firm C, there is no current price being charged to them. Section 212.82(a) provides that a refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent that it is prenotified and cost-justified in accordance with the provisions of § 212.82(c) through (k). Firm C must therefore establish lawful base prices for these former wholesale purchasers which are now once again purchasing from Firm C.

Issue. How does Firm C calculate the base prices it may charge the former wholesale purchasers for sales under § 211.124?

Ruling. Pursuant to the provisions of 10 CFR 212.82(f), Firm C has already established base prices for sales of its middle distillate fuels to particular classes of purchasers. This base price is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 plus increased product costs calculated pursuant to 10 CFR 212.83(b) and the refiner incentive factor calculated pursuant to 10 CFR 212.83(b) and the refiner incentive factor calculated pursuant to 10 CFR 212.84.

The former base period purchasers which Firm C must now resume supplying must be assigned the same base price as that assigned to other purchasers in the most similarly situated existing class of purchaser (as defined in 10 CFR 212.31). Thus, if one class of purchaser exists for purchasers who buy in bulk and one of the former purchasers buys in bulk, the base price for

that former purchaser should be the same as the base price of the class of bulk purchasers.

Firm C is not permitted to use the requirements of the allocation program as a rationale for rearranging its existing pattern of classes of purchasers or creating new classes of purchasers. The pattern of classes of purchasers created for the former purchasers should, in general, correspond to the previously existing pattern of classes of purchasers. For example, if the 25 percent of the current purchasers being replaced were patterned in classes of purchasers of which 20 percent had a low base price for contract purchases and 5 percent had a high base price for spot purchases, Firm C may not treat all of the former purchasers as falling into the class of purchaser for the spot purchases. Such a rearrangement of classes of purchasers would constitute an unlawful price increase. Instead, Firm C must fit the former purchasers into its existing classes of purchasers so that the 20 percent to 5 percent ratio is generally maintained. This same rule also applies to resellers who establish their selling prices pursuant to 10 CFR 212.93.

[39 FR 3910, Jan. 30, 1974]

RULING 1974-2—REDIRECTED SALES PRICING

Facts. Firm A, a refiner, supplies residual fuel oil to Utility B located in the Mid-Atlantic area. Under the authority of the exception clause of § 211.164(a), the Federal Energy Office has ordered that certain of Firm A's volume of residual fuel oil under contract for delivery to Utility B now be redirected and delivered to Utility C, which is also a contract customer of Firm A for the same grade of residual fuel oil; and that another volume of residual fuel oil under contract for delivery to Utility B be redirected and delivered to Utility D, which is not a customer of Firm A and is located in a different geographical region than Utility B. Firm A treats Utility B and Utility C as separate classes of purchasers with the respective contract prices being the base prices for these two classes of purchasers.

Issue. What price may Firm A charge to Utilities C and D for the redirected volumes of residual fuel oil and what obligations, if any, exist to indemnify Utility B for the redirected fuel?

Ruling. In accordance with 10 CFR 212.82(a), Firm A may not charge Utilities C and D a price in excess of the base price except to the extent that no non-product costs increases are prenotified and cost justified under the procedures in 10 CFR 212.82(c) through (k). Because Utility C is already a purchaser from Firm A of the same product as is sold to Utility B, a base price for Utility C for that product has already been established by Firm A. Assuming that non-product cost increases have been prenotified, Firm A may charge Utility C for the redirected volume of residual fuel oil a price not in excess of the same lawful base price as it charges Utility C under the existing contract between Firm A and Utility C.

In the case of Utility D, because it is not a customer of Firm A, no base price for Utility D has yet been established. However, Utility D is clearly stepping into the same position as Utility B and, therefore, must be considered to belong to the same class of purchaser. The base price set by Firm A for Utility D will be the same as the contractual price presently charged to Utility B, which is the base price of Utility B, except to the extent that there is a difference in transportation costs to Utility D as compared with Utility B.

As defined in 10 CFR 212.82(f), the base price is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973 plus increased product costs incurred between the month of measurement and the month of May 1973. Because "increased product costs" as defined in 10 CFR 212.83(b) include transportation costs, any increase or decrease in the transportation costs of Firm A caused by delivery to a different geographical area would result in a higher or lower base price to Utility D than the contractual price between Firm A and Utility B.

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No obligations arise due to the redirection of fuel from Utility B which would require Utilities C and D to compensate Utility B in any manner for the quantity of fuel being directed. Of course, should Utility B in the future develop a shortage in its supply, FEO could order diversion of supplies to Utility B from Utilities C and D or any other utilities that might have a comparative surplus supply.

This same rule also applies to prices charged under the same circumstances by a reseller pursuant to 10 CFR 212.93.

[39 FR 3911, Jan. 30, 1974]

RULING 1974-3—SUPPLIER/PURCHASER RELATIONSHIPS UNDER THE PETROLEUM ALLOCATION REGULATIONS

A number of questions have arisen concerning the obligations of suppliers and the rights of purchasers to allocations under the Petroleum Allocation Regulations issued by the Federal Energy Office on January 14, 1974 (39 FR 1924 et seq., January 15, 1974). In particular, FEO has received inquiries concerning the scope and intent of §§ 211.13 and 211.24 of the Regulations which require generally that suppliers of petroleum products shall provide allocations to their wholesale purchasers of record as of the base period. This Ruling is issued pursuant to § 205.181 of the Regulations and is designed to be of assistance to all persons in determining their rights and obligations under the Emergency Petroleum Allocation Act of 1974 (Pub. L. 93-159) and the Regulations issued thereunder.

1. As a general proposition, the Regulations require a supplier to provide an allocation to each of its historical wholesale purchasers during the base period—even if the supplier has severed all contractual relationships with such purchasers since the base period. In the normal case of a supplier who has not significantly reduced its marketing or distribution activities in a region, most of the supplier's current purchasers (as of January 15, 1974) will also have been its base period purchasers. No change in such purchaser/supplier relationships is contemplated by the Regulations. However, with respect to base period wholesale pur-

chasers of a supplier who are not its current purchasers, the Regulations require the supplier to take immediate action to provide for such base period purchasers' allocations pursuant to Subpart A of the Regulations. Under § 211.25, a supplier may arrange to supply its base period purchasers' allocations either directly or through appropriate exchange agreements with other suppliers in accordance with normal business practices. Wholesale purchasers who are not historical base period purchasers from their current supplier are expected to look to their base period supplier to provide for their allocations. Suppliers should re-establish relationships with their base period wholesale purchasers on an equitable basis. If the timing and method of implementing a supplier's program of changeover to its base period wholesale purchasers has the effect of discriminating against any category or group of such purchasers, such a supplier may be subject to sanctions for having taken "retaliatory action" within the meaning of § 210.61 of the Regulations.

2. A supplier must provide for allocations to its wholesale purchasers of record during the base period as long as those purchasers continued to maintain their ongoing business since the base period. A purchaser does not lose his right to an allocation from his base period supplier unless, since the base period, the purchaser abandoned his ongoing business entirely or transferred his entire ongoing business to a third party. (§ 211.24) In the latter case, the third party has acquired the right to the allocation from the historical supplier, and the original purchaser (if he has opened a new business) must apply to a supplier as a "new customer." Unless the historical purchaser has completely abandoned his original ongoing business or conveyed it to a third party, he continues to have the right to an allocation from his historical supplier even though (1) the supplier ceased supplying the purchaser since the base period, (2) the supplier terminated a franchise or lease agreement with the purchaser since the base period, or (3) the purchaser has moved the location of his ongoing

business to other premises since the base period.

3. The Regulations do not permit a supplier to escape its obligation to its wholesale purchasers of record during the base period if the purchaser has changed its brand or trademark affiliation since that time. The success of the allocation program depends upon the ease with which wholesale purchasers can return to their base period supplier relationships and, in the event of imbalances, the ease with which the Federal Energy Office can redirect the products of various suppliers in order to assure an equitable nationwide allocation of petroleum products. The Federal Energy Office is aware that it is a normal business practice in the industry for a supplier to provide its purchasers with products through exchange agreements with other suppliers and the Regulations recognize this practice. (§ 211.25) Accordingly, a change in brand or trademark affiliation is not a basis (except in unusual cases) upon which the Federal Energy Office would permit suppliers to refuse to provide allocations to their historical base period wholesale purchasers.

4. The fact that a supplier has, during or since the base period, terminated or significantly reduced its marketing or distribution activities in a region does not diminish the obligation of that supplier to provide allocations to its base period wholesale purchasers in that region. The Regulations recognize, however, that under certain circumstances it may be appropriate for such suppliers to apply to the Federal Energy Office to seek adjustments in the method of supplying their base period purchasers. (§ 211.14(d)) It must be emphasized, however, that until the Federal Energy Office authorizes reassignment of wholesale purchasers pursuant to § 211.14(d), all suppliers have an immediate and continuing obligation to provide allocations to their base period wholesale purchasers—either directly or through appropriate exchange agreements with other suppliers. Suppliers which have embarked on a program to terminate or reduce their marketing and distribution activities in a region must cease such

withdrawal program pending a determination by the Federal Energy Office of whether reassignment of their base period wholesale purchasers in that region would be appropriate under the Regulations.

5. Withdrawal from a region by a supplier since the base period does not alter the obligations owed to base period purchasers in that region by the supplier. However, certain actions by suppliers, such as cancelling a lease under which a base period purchaser has been operating on ongoing business on premises owned by the supplier may have the effect of putting the purchaser out of business. The Regulations provide that purchasers who have gone out of business shall not be eligible for allocations premised on base period supplier relationships. Nevertheless, the Federal Energy Office is prepared to take action to prevent practices by suppliers which have the clear effect on circumventing the provisions of the Allocation Regulations. Suppliers who terminated leases with their base period purchasers in the period following enactment of the Emergency Petroleum Allocation Act of 1973 or whose conduct with respect to base period purchasers otherwise threatens to terminate the latter's ongoing business, may be determined to have engaged in "retaliatory action" within the meaning of § 210.61 of the Regulations. That section prohibits any action, including a refusal to continue to sell or lease, contrary to the purpose or intent of the Federal Energy Office, when such action is taken against another firm or individual who exercises any rights conferred by the Emergency Petroleum Allocation Act of 1973, or by the Regulations issued thereunder. Furthermore, termination by a supplier of leases with base period purchasers—as part of a program of withdrawal from a region—may be determined to be in violation of § 210.62 of the Regulations which requires suppliers to deal with purchasers according to "normal business practices" and prohibits modification of "normal business practices" so as to result in circumvention of any provision of the Regulations. Because the Regulations impose a continuing responsibility upon a supplier to pro-

vide allocations to his base period wholesale purchasers despite its withdrawal from a region, action which is in furtherance of a program of withdrawal by the supplier from a region may not be considered a "normal business practice" until the Federal Energy Office authorizes a program of reassignment of that supplier's base period purchasers to other suppliers in the region.

6. Any supplier which, during or since the base period, has significantly reduced its marketing or distribution activities in any of the 10 Regions of the Federal Energy Office may apply to the National Federal Energy Office to seek adjustment in the method of supplying customers in that region. The application shall contain an explanation of the reasons why it is impractical for that supplier to provide allocations to its base period wholesale purchasers in the region—either directly or through exchange agreements with other suppliers. In addition, the application shall contain the following information:

(1) The number of wholesale purchasers of record in the region during each month of the base period.

(a) Who were branded independent marketers.

(b) Who were non-branded independent marketers.

(c) Other wholesale purchasers (describe).

(2) The volume of product supplied, either directly or through exchange agreements, to each of the classes of entities enumerated in response to (1) for each month of the base period.

(3) The number of wholesale purchasers of record during each month of the base period (or successors in interest to their ongoing business) in each of the classes enumerated in (1), who maintained that ongoing business in the region during each of the following periods:

(a) November 1–November 30, 1973

(b) December 1–December 31, 1973

(c) January 1–January 31, 1974.

(4) With respect to each of the classes of entities described in (1), for each period specified in (3), the number of entities in the region who received any supplies of product from the applicant, either directly or through ex-

change agreements with other suppliers. For each such period and class of purchaser, the allocation fraction utilized (or if an allocation fraction was not utilized, the volume of product).

(5) For each of the classes of purchasers described in (1), for each period specified in (3), the allocating fraction utilized for the balance of any supplier's marketing or distribution system.

Based on an application prepared in accordance with the foregoing, the Federal Energy Office will consider whether to authorize reassignment of customers pursuant to § 211.14(d) of the Regulations. It should be emphasized, however, that until such reassignments are authorized, all suppliers are obligated to provide allocations to their base period wholesale purchasers of record—either directly or through appropriate exchange agreements with other suppliers. The ability of a supplier to provide allocations through interim arrangements, including exchange agreements, shall not prejudice its application for reassignments under § 211.14(d). Failure to provide for allocations to base period wholesale purchasers as provided by the Regulations will expose suppliers to the remedies and sanctions specified in the Regulations.

[39 FR 4467, Feb. 1, 1974]

RULING 1974-4—IMPACT OF STATE TAX ON GROSS SALES

Facts. State H imposes a four percent "gross income tax" on the gross sales of retailers. The tax is applicable to retail gasoline dealers. Dealer G has sustained increases in the cost for gasoline since May 15, 1973 of \$.05 per gallon. Pursuant to the reseller price rule in 10 CFR 212.93, Dealer G will pass this product cost increase on to his customers. Because the tax is levied on gross sales revenues, however, the amount of tax owned by Dealer G will now increase as its selling price increases. In order to pass through the full amount of increased product cost (\$.05) and additional tax (\$.002080) Dealer G would have to increase the price of his gasoline by \$.052083 per gallon ($4\% \times \$0.052080 = \$0.002083$).

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Issue. May Dealer G increase the price of his gasoline by an amount sufficient to recover the extra tax on the product cost passthrough allowed by 10 CFR 212.93?

Ruling. Yes. Section 212.93(a) states that "a seller may not charge a price for any item subject to this subpart which exceeds the weighted average price at which the item was lawfully priced by the seller in transactions with the class of purchaser concerned on May 15, 1973, plus an amount which reflects on a dollar-for-dollar basis, increased costs to the item."

The gross income tax imposed by State H has the same impact as a sales tax since it is in fact a tax imposed on the customer based on retail selling prices and collected by the retailer seller. State sales taxes collected under an agency arrangement would not be considered part of the price charged by Dealer G in retail sales subject to the pricing rule in § 212.93. Therefore, the increase in the amount of gross income tax of State H paid by Dealer G as a result of rising product costs may be passed through to the customer pursuant to § 212.93. A simple formula by which the total allowable cost may be computed is:

Increase in Product Cost Implemented/
+ 1 - gross income tax rate

This formula will result in a number which reflects the increase in price necessary to recover both the full product cost increases and the tax adjustment.

The increase in the price of gasoline necessary to collect the increased tax also does not need to be prenotified as a price increase if Dealer G is a refiner-retailer. Of course, since prices for gasoline may be increased only once in a calendar month, Dealer G must include the tax adjustment at the same time that product costs under § 212.93(a), and nonproduct costs under § 212.93(b) are passed through for that month's price increase. If in that month, Dealer G implements less than the full amount of increased product costs, he may only include the corresponding tax increase on that amount for that month and must carry over the balance of the tax increment until a subsequent implementa-

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tion of the product cost which was carried over under § 212.93(e).

[39 FR 5310, Feb. 12, 1974]

RULING 1974-5—PROPANE; PRICE DETERMINATION

Several questions have arisen regarding the application of the special rule for the pricing of propane by refiners set forth in 10 CFR 212.83(c)(1)(iii). Prior to issuance of this special rule, increased propane as an "other than a special propane" as an "other than a special product" and computed under § 212.83(c)(1)(ii). The effect of the amendment is to place a maximum on the amount of increased product costs incurred after January 31, 1974, that can be allocated to propane during the twelve month period following that date. This special rule provides greater flexibility on a monthly basis than would otherwise occur were propane treated as a "special product."

The total amount of these increased product costs that may be allocated to propane must be directly proportional to the ratio that the total sales volume of propane bears to the total sales volume of all covered products of that refiner during the twelve month period following January 31, 1974. For example, if a refiner's total sales of propane for the twelve month period equal 10 percent of total sales volume of all covered products, the increased product cost incurred during that period which may be allocated to propane may not exceed 10 percent of its total increased product cost for the same twelve month period. The new rule does not change the base price method of calculation otherwise stated for covered products in § 212.82(f). The allocable increased product costs must still be added to the refiner's May 15, 1973 selling price in order to determine the base price of the refiner's propane.

A refiner may allocate his increased costs disproportionately to his sales of propane in any month of the twelve month period so long as the ratio that increased costs allocated to propane bears to total increased cost for the entire period is the same as the ratio that total sales of propane bears to

total sales of covered products for that period.

Increased product costs incurred prior to January 31, 1974 may be allocated to propane sold after that date without regard to the proportionate pass-through test. The new amendment serves only to limit the amount of the increased product costs incurred after January 31, 1974, that may be allocated to propane. Increased product costs incurred prior to January 31, 1974 may also be banked and carried forward as increased costs that may be used to justify an increased base price in a future month in accordance with the provisions of § 212.83(d)(2). Refiners may therefore immediately reduce propane prices and recover incurred product costs in accordance with the banking provisions.

[39 FR 6111, Feb. 19, 1974]

**RULING 1974-6—ALLOCATED GASOLINE PRODUCTS;
DISCRIMINATION AMONG PURCHASERS**

Facts. Firm A is a retail marketer of motor gasoline and diesel fuel in a state or locality which has adopted a plan which establishes certain categories of purchasers and specifies the dates, times or conditions under which sales to such categories of purchaser can be made. The plan to which Firm A is subject permits the sale of gasoline to customers with vehicles with even numbered license plates only on even numbered dates, and the sale of gasoline to customers with vehicles with odd numbered license plates only on odd numbered dates. The plan also provides that certain categories of purchasers, such as those with emergency vehicles or with commercial vehicles, can purchase gasoline on any date.

Firm B is a retail marketer of motor gasoline and diesel fuel which is subject to mandatory allocation requirements under which it makes 100 percent of current needs for gasoline available to certain categories of purchaser. Firm B is also subject to an order under the State set-aside program to make available certain amounts of gasoline to a particular purchaser.

Firm C is a retail marketer of motor gasoline and diesel fuel which has a normal business practice, established before the mandatory allocation pro-

gram became effective, of providing certain preferential treatment in connection with the sale of products to commercial accounts or in bulk to commercial users. Such practices include the sale to such purchasers from a separate pump or at times other than when sales are being made to the general public.

Issue #1. May Firm A follow the state plan without violating 10 CFR 210.62, which requires that suppliers deal with purchasers according to normal business practices and that no supplier engage in any form of discrimination among purchasers?

Issue #2. May Firm B follow the mandatory allocation requirements and the order under the State set-aside program, without violating 10 CFR 210.62?

Issue #3. May Firm C continue its normal business practice of giving some form of preferential treatment to purchasers for commercial accounts or in bulk for commercial use, such as selling from a separate pump or making sales at a time other than when sales are being made to the general public without violating 10 CFR 210.62?

Ruling. Firm A may follow a state or local plan, whether mandatory or voluntary, which establishes certain categories of purchasers and certain conditions of sale as to such categories without violating 10 CFR 210.62, provided that Firm A does not discriminate in its treatment of purchasers within the categories established by the plan. Firm A may not change its normal business practices except to the extent that it distinguishes among the categories of customer specified by the state. Such action by Firm A would not be regarded as "discriminatory" under 10 CFR 210.62(b), since it would not constitute "extending any preference or sales treatment which has the effect of frustrating or impairing the objectives, purposes and intent of this Chapter or of the Act." It should be noted, however, that compliance with any such state plan by Firm A must be uniform, and the application of such a plan to only some purchasers (for example, purchasers who are not regarded by Firm A as regular customers), but to other purchasers, would consti-

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tute prohibited "discrimination" under 10 CFR 210.62(b).

Firm B may follow the mandatory allocation requirements and the order under the State set-aside program. 10 CFR 210.62 was adopted in order to further the goals of the over-all mandatory allocation program, and following the requirements of that program would not constitute prohibited "discriminatory" action under 10 CFR 210.62.

Firm C may continue to give some form of preferential treatment to purchasers for commercial accounts or in bulk for commercial use, provided the practice was established as a normal business practice, consistent with 10 CFR 210.62(a), and that it is not followed in such a manner as to circumvent the objectives of the mandatory allocation program.

[39 FR 6111, Feb. 19, 1974]

RULING 1974-7—TRUCK STOP LEASES

NOTE: See Ruling 1974-24.

Facts. Firm A is the lessee operator of a truck stop facility which provides retail fuel sales of gasoline and diesel fuel, restaurant services, vehicle repair facilities and other sales and service activities. Firm A leased the real property used for its truck stop facility under a single lease which, under the terms prevailing on May 15, 1973, provided for rental of the entire property, with the rent based on a percentage of total sales of fuel and a percentage of total sales of other products and services, subject to a certain minimum dollar amount.

Upon the expiration of this lease, after the implementation of the Cost of Living Council Phase IV rules for petroleum product prices which were subsequently incorporated into the FEO regulations as Subpart G of 10 CFR Part 212, the lessor seeks to establish a new lease for the truck stop which (1) treats the fuel sales portion of the real property as a separate property, with a separate and higher rental than was formerly required; and (2) treats the non-fuel sales portion of the real property as a separate property, with a separate and higher rental than was formerly required.

Issue #1. May the lessor establish separate rents for different uses of real property which was under a single lease for several uses on May 15, 1973?

Issue #2. May the lessor increase the rent above that which prevailed on May 15, 1973, either for the fuel sales portion of the real property or for the non-fuel sales portion of the real property, pursuant to an escalation clause or termination clause in the lease agreement in effect on May 15, 1973, or otherwise?

Ruling. No. A lessor of real property used in retailing gasoline may not now treat separately uses of real property that were formerly treated in a single lease agreement, nor may it raise the rent with respect to any use of such property beyond the rent charged pursuant to the contractual terms prevailing on May 15, 1973.

The real property covered by the single lease in effect on May 15, 1973 is regarded as the "real property used in retailing gasoline," as to which the lessor may not increase the rent under 10 CFR 212.103. The fact that the old lease provided separate formulas for the rent attributable to the particular uses of the real property does not provide a basis for the lessor to make separate leases for these uses or to increase the rent, either separately or together, for these uses. The separate rental terms for different uses of the real property are included among "the contractual terms prevailing on May 15, 1973" which, under 10 CFR 212.102 define the "base rent with respect to a lease of real property used in the retailing of gasoline" which a lessor may not increase, under 10 CFR 212.103.

Thus, a lessor which leased real property used in the retailing of gasoline—irrespective of other uses of the real property—may not exceed in any respect the rental for either the "fuel area" or the "non-fuel area", that was being charged on May 15, 1973, pursuant to the contractual terms prevailing on May 15, 1973.

[39 FR 10434, Mar. 20, 1974]

RULING 1974-8—ALLOCATION OF NON-BONDED AVIATION FUEL

Questions have arisen concerning interpretation of § 211.145(c)(5) of the

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Mandatory Petroleum Allocation Regulations (10 CFR 211.145 as amended at 39 FR 12995 and 39 FR 13549) regarding allocation of non-bonded aviation fuel. Section 211.145(c)(5) provides: "None of the provisions of this paragraph shall affect existing contracts for the purchase of bonded aviation fuels."

This provision means that § 211.145(c), concerning allocation of non-bonded fuel to international air carriers in specified circumstances, does not supersede existing contracts for supply of bonded aviation fuel and does not relieve the parties of any contractual obligations thereunder. Bonded fuel is not subject to allocation under the Regulations (10 CFR 210.33). Accordingly, there is no basis for preemption of existing contracts for such fuel under § 210.77 of the regulations. The sentence in § 211.145(c)(5) simply makes this point explicit. At the same time, a carrier's contractual obligation (1) to purchase bonded fuel from a supplier other than its base period supplier or (2) to purchase bonded fuel at a price higher than the lawful price of non-bonded fuel, cannot be the basis for a refusal by a supplier to honor timely certification by that carrier for non-bonded fuel pursuant to § 211.145.

Under the regulation, international carriers are required to certify to their base period suppliers (1) the volumes of bonded aviation fuel which can be obtained from the base period suppliers at the lawful price for non-bonded fuel, and (2) the additional volumes of bonded fuel which the carrier intends to obtain for a month regardless of price, under contract or otherwise. Once the carrier has so certified, the supplier is obligated to provide non-bonded fuel in such amounts as determined under the regulations. It is anticipated that a carrier which has a contractual obligation to purchase bonded fuel (at any price) would include such amounts in its certification. However, the regulations do not require the carrier to certify amounts which it has determined not to accept from the contract supplier on the basis of a contract dispute. The base period supplier must accept such a certification. The contract supplier is left

to its normal contractual remedies for any breach.

[39 FR 14509, Apr. 24, 1974]

RULING 1974-9—MINIMUM RENT PROVISIONS IN LEASES OF REAL PROPERTY USED IN THE RETAILING OF GASOLINE

Facts. Firm A, engaged in the distribution of refined petroleum products, leases a parcel of real estate to individual B, who operates a retail gasoline outlet on the property. The contractual terms prevailing on May 15, 1973, provided for rent to be paid monthly at a rate of 2¢ per gallon of gasoline sold by B during the month, and that in no event was the total rent to be paid in that month to be less than \$1,200.00. (The equivalent of 2¢ per gallon of gasoline multiplied by 60,000 gallons). On May 15, 1973, B was selling gasoline at a monthly rate of 80,000 gallons. Recently, Firm A's allocation fraction has been reduced so that B is receiving only 50,000 gallons of gasoline per month.

Issue. May Firm A charge the minimum rent of \$1,200.00 per month?

Ruling. Yes. Since the minimum rent provision was a contractual term which could have operated on May 15, 1973, to impose a monthly rent of \$1,200.00 if the volume during May 1973 had been less than 60,000 gallons, the minimum rent provision is considered to be a prevailing contractual term on that date, and must be taken into account in determining "base rent" within the meaning of 10 CFR 212.102. Enforcement of the minimum rent provision, therefore, does not constitute an increase in "base rent" prohibited by 10 CFR 212.103.

[39 FR 15140, May 1, 1974]

RULING 1974-10—CHANGES IN CREDIT TERMS

Facts. Firm A, a refiner, sold gasoline to Firm B on May 15, 1973, under terms which permitted Firm B to pay for a delivery of gasoline at the time the next delivery was made.

Firm C, a refiner, sold gasoline to Firm D on May 15, 1973, under terms which included a requirement that Firm D make a cash deposit with Firm C as security for prompt payment for the gasoline sold by Firm C to Firm D. The amount of the deposit required of

Firm D depended upon Firm D's credit rating and the amount of credit Firm D obtained, which in turn depended upon the volume of purchases, the frequency of payments, and on the price of the gasoline that was purchased.

Issue #1. May Firm A now require Firm B, which has been paying for deliveries of gasoline on a so-called load-to-load basis, to pay for each delivery at the time it is made?

Issue #2. May Firm C increase the amount of the security deposit required from Firm D?

Ruling. Firm A may not discontinue its practice of accepting payment for deliveries of gasoline on a load-to-load basis. 10 CFR 212.82(f)(1)(i) states: "The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of May 1973 and measured pursuant to the provisions of § 212.83. In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." Price is defined in 10 CFR 212.31 as "any consideration for the sale or lease of any property or service and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form."

Thus, the May 15, 1973 price includes both the price per gallon of gasoline and the time within which that price had to be paid, i.e., the credit terms that prevailed on that date. The imposition of more stringent credit terms by a refiner would constitute an impermissible increase in the May 15, 1973 price because it would reduce the time within which payment had to be made. The cost of credit for the period between deliveries, which was incurred by Firm A would, if the terms could now be altered, have to be paid by Firm B.

Firm A could change its credit practices with respect to Firm B only if it first applied to the FEO, and made a showing as to why the change was necessary, and if the FEO authorized the change, as well as an appropriate adjustment to Firm A's May 15, 1973 price. The presumption, however,

would be against authorizing such changes in credit terms because of the differing impacts they have on Firm A and Firm B because of their differing access to and cost of obtaining credit.

Firm C can increase the amount of the security deposit it requires, but only to the extent that the actual increase in the amount of the security deposit is justified by increased credit being extended to each retail seller because of increases in the price of gasoline or in the volume of purchases. Thus, the percentage increase in the amount of the security deposit required of Firm D can be, at most, the percentage by which the selling price of gasoline to Firm D has increased between May 15, 1973, and the present, adjusted for changes in volume of purchases between May 15, 1973, and the present. Any further increase would be an impermissible increase in Firm C's May 15, 1973 selling price, since it would impose an increased cost of credit on Firm D. Similarly, Firm C could not increase the frequency of payments required of Firm D because to do so would reduce the amount of credit being extended to Firm D.

[39 FR 15140, May 1, 1974]

**RULING 1974-11—NEW AND RELEASED CRUDE OIL,
CURRENT FREE MARKET PRICE UNDER § 212.74**

Facts. Firm A, a producer, produced 8,170 barrels of a single grade of crude oil from a particular property in April, 1974. The base production control level for that property for the month of April is 6,420 barrels. The ceiling price under § 212.73 for the base production control level crude oil is \$4.10 per barrel and its free market price is \$9.25 per barrel. The free market price is the price being paid in the open market for substantial quantities of that grade and quality of imported crude oil or so-called "stripper-well" crude oil.

Firm A receives an offer from Firm B to purchase its April production of 8,170 barrels of crude oil at an average price of \$9.00 per barrel. This price is based upon a price of \$15.82 per barrel for 1,750 barrels of "new" crude petroleum priced under § 212.74(a) and a price of \$15.82 per barrel as the "cur-

rent free market price," to be applied in the formula of § 212.74(b).

Issue. Is Firm B's offer a "bona fide offer . . . to buy such crude oil at a lawful price," within the meaning at § 211.64(a)?

Ruling. No. Firm B's offer is not a bona fide offer to buy at a lawful price because it makes use of an artificially high "current free market price" in order to obtain all of Firm A's production at an average price per barrel that approaches the current free market price for all of Firm A's production of 8,170 barrels, even though Firm A only produced 1,750 barrels of "new" oil.

Section 212.74 was intended to provide an incentive for increased production by permitting the amount of production in excess of the base production control level ("new" oil) to be sold at free market prices, and, in addition, to permit a portion of the base production control level crude oil that is equivalent to the amount of "new" oil also to be sold at free market prices. The formula of § 212.74(b) was intended to spread the increased price of this amount of crude oil equivalent to the amount of "new" oil, which is permitted to be sold at free market prices, across the entire volume of base production control level crude oil sold during the month. It was not intended to permit all base production control level crude oil to be sold at free market prices.

Use of an artificially high "current free market price" for "new" oil and in the formula of § 212.74(b) constitutes an attempt to evade the price limitations of § 212.73 applicable to crude oil, (other than "new" and "released" crude oil) and to obtain an unlawful price, and would be contrary to § 210.62(c), which provides, in part, that "Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter . . . is a violation of these regulations."

Accordingly, the purpose of this ruling is to make clear that the "current free market price" for purposes of § 212.74(a) "new" oil, and for use in the formula of § 212.74(b), is the price being paid for substantial quantities of that grade and quality of crude oil,

from the nearest field, in the open market in sales not subject to price controls, but not including any sales involving crude oil priced pursuant to the price formula of § 212.74(b). Use of any higher "current free market price" will be treated as a violation of the price regulations of § 212.73 and § 210.62(c).

[39 FR 17766, May 20, 1974]

RULING 1974-12—UNRECOUPED INCREASED PRODUCT COSTS WHERE PRICES CHARGED UNDER FIXED-PRICE CONTRACTS ARE LESS THAN THE LAWFUL BASE PRICE

Facts. Firm A, a refiner, sells jet fuel to Firm X and Firm Y, which are air carriers. Firm A's weighted average selling price at which jet fuel was lawfully priced in transactions with the class of purchaser to which Firm X and Firm Y belong was, on May 15, 1973, 20¢ per gallon. Firm A has measured its increased product costs pursuant to § 211.83 for the month of March, 1974 (the month of measurement), and has allocated \$340,000 of those costs to jet fuel. Based on an estimated volume of 2,000,000 gallons of jet fuel to be sold in April, 1974 (the current month), Firm A determines increased product costs of 17¢ per gallon to be used in computing the base price of jet fuel for the month of April, 1974. In April, Firm A sells jet fuel to Firm X at a price specified under a fixed-price contract of 25¢ per gallon, and to Firm Y, which does not have a fixed price contract, at the lawful base price of 37¢ per gallon.

Issue. May the increased costs that Firm A allocated to the base price of jet fuel but which it did not recover through sales to Firm X in April, 1974, be carried forward by Firm A and used in computing its increased product cost which may be allocated to the prices of covered products other than special products for the month of May, 1974?

Ruling. Yes. § 212.83(d)(2) provides that "if in any month beginning with October 1973, a firm charges prices for covered products other than special products which result in the recoupment of more or less total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable

under paragraph (c)(1)(ii) of this section, . . . the amount of increased product costs not recouped may be added to May 15, 1973 selling prices to compute base prices for covered products other than special products in the subsequent month provided that the amount of the increased product cost not recouped and included in computing the base prices of a particular covered product other than a special product is equally applied to each class of purchaser."

In this instance, the price charged to Firm X, 25¢ per gallon, results in the recoupment of 5¢ of increased product cost per gallon, and the price charged to Firm Y, 37¢ per gallon, results in the recoupment of 17¢ of increased product cost per gallon. If Firm A actually sold 2,000,000 gallons of jet fuel during the month, with 1,500,000 gallons sold at 37¢ per gallon to Firm Y, and 500,000 gallons sold at 25¢ per gallon to Firm X, it would have recouped \$280,000 of its increased product cost—\$225,000 in sales to Firm Y (1,500,000 gallons x \$.17) and \$25,000 in sales to Firm X (500,000 gallons x \$.05).

Thus, of the \$340,000 in increased product costs assigned to jet fuel for the month of April, 1974, Firm A would have recouped \$280,000 and would have \$60,000 in unrecouped increased product costs available to carry forward into its calculation of increased product cost when computing the base prices of covered products other than special products for the month of May, 1974. It should be noted that Firm A could have allocated a lesser amount of its total increased product cost to the price of jet fuel for the month of April, 1974. For example, Firm A could have allocated \$100,000 of its increased product cost to jet fuel, which would have resulted in 5¢ per gallon of increased product costs and a base price of 25¢ per gallon of jet fuel. The balance of the \$340,000 in increased product cost that was available for use in computing jet fuel base prices could then have been assigned to other covered products other than special products, or could have been voluntarily "banked" for recovery in a subsequent month. Similarly, the \$60,000 of increased product cost

unrecouped in April, 1974, because of sales to Firm X at less than the lawful base price need not be assigned to jet fuel in computing base prices for a subsequent month, but may be assigned to the prices of some other covered product other than a special product, or may be "banked" until a subsequent month.

[39 FR 18423, May 28, 1974]

RULING 1974-13—MANDATORY PETROLEUM ALLOCATION; MOTOR GASOLINE RETAIL SALES OUTLETS

The revision of Subpart F of Part 211 of the Mandatory Petroleum Allocation Regulations issued May 1, 1974 (39 FR 15975, May 6, 1974), to be effective June 1, 1974, has raised several questions of general interest which FEO considers appropriate to address in a ruling. The questions involve § 211.106 concerning motor gasoline retail sales outlets, which has been amended concurrent with this ruling.

Section 211.106 (c)(2)(i) provides that an entity which operates more than one retail sales outlet and which intends to go out of business with respect to one or more of such retail sales outlets, may petition for an adjustment of the base period volumes of its retail sales outlets which will continue in business. In addition, § 211.106(c)(2)(ii) as amended provides that an independent marketer or small or independent refiner which closed retail sales outlets during the period January 1, 1973 through May 31, 1974 shall receive an adjustment to the base period volumes of the retail sales outlets which it continues to operate.

Section 211.106(b)(3) provides that a supplier may not reassign all or part of an allocation entitlement from one retail sales outlet to another without FEO permission unless the supplier is an independent marketer, or a small or independent refiner. Independent marketers or small or independent refiners are permitted under the recent amendment to reassign up to 20 percent of base period use from one retail sales outlet to another without FEO approval.

Section 211.106(b)(2) permits the treatment of some or all of the retail sales outlets operated by an independ-

ent marketer or a small or independent refiner as a single firm under certain circumstances.

Section 211.106 (b)(2) and (b)(3)(i) and § 211.106(c)(2)(i) contemplate three distinct petitions requiring action by FEO. This ruling will set forth the criteria and data required for relief under those three subparagraphs. As a preliminary matter, it is to be noted that FEO will entertain such petitions prior to June 1, 1974, although the effective date of the new revision is June 1, 1974.

Petitions which involved retail sales outlets in more than one FEO region shall be filed with the regional FEO in each affected region. The regional offices shall coordinate their review and disposition of such petitions. In the event that the regional offices cannot agree upon disposition of such a petition, the petition shall be forwarded to National FEO for resolution.

The relief provided by § 211.106 (b)(2) and (b)(3)(i) and § 211.106(c)(2)(i) involves only those retail sales outlets which a petitioner actually operates or operated. Retail sales outlets in which a petitioner only holds or held a real property interest, including a lease, but which are or were operated by another entity, may not be considered for the relief afforded by § 211.106.

1. *Petitions for adjustments of base period use upon the closing of a retail sales outlet.* Any entity which operates more than one retail sales outlet and closes or intends to close one or more such outlets after June 1, 1974, may petition FEO pursuant to § 211.106(c)(2)(i) for an adjustment to the base period use of its retail sales outlets which will remain in business. A grant of such a petition would permit an increase in the base period use of the remaining retail sales outlets which the petitioner operates by an amount which does not exceed the base period use of the retail sales outlet or outlets which the petitioner closes or intends to close. Further, § 211.106(c)(2)(ii) provides an automatic adjustment for retail sales outlets closed by independent marketers or small or independent refiners during the period January 1, 1973 through June 1, 1974.

FEO anticipates that the relief available pursuant to § 211.106(c)(2) will resolve many of the problems which might otherwise prompt a petition under § 211.106 (b)(2) and (b)(3)(i). Further, petitions pursuant to § 211.106 (c)(2)(i) will be susceptible to easier processing than those under § 211.106(b)(2) and (b)(3)(i) and for these reasons, FEO will encourage priority processing and resolution of § 211.106(c)(2)(i) petitions.

(a) *Petitions of independent marketers and small and independent refiners.* Independent marketers or small or independent refiners may petition to adjust the base period use of retail sales outlets which they will continue to operate to take into account the retail sales outlets which they close or intend to close after June 1, 1974.

An independent marketer, or small or independent refiner which is the supplier of retail sales outlets which it operates generally should not petition for a § 211.106(c)(2)(i) adjustment since § 211.106(d)(2) provides for distribution of allocation entitlements among the retail sales outlets which it supplies whenever one of those retail sales outlets is closed. Section 211.106(d)(2) therefore insures that such entitlements stay within such supplier's distribution system. FEO will be reluctant to permit such a supplier to increase the base period volume of such supplier's own operated retail sales outlets to compensate for the closing of one of its retail outlets. The effect of § 211.106(d)(2) is to increase the supply available to all customers of such suppliers regardless of whether they are operated by the supplier, whenever a retail sales outlet supplied by such a supplier is closed.

In this connection, it should be noted that the operator of retail sales outlets is also the supplier of those outlets if it operates a terminal facility from which it furnishes product to, or otherwise physically delivers gasoline to, such outlets. The operator of retail sales outlets physically delivers gasoline to its outlets if it provides the tank trucks which deliver the gasoline to its retail outlets.

An independent marketer or small or independent refiner which files a petition for relief under

§ 211.106(c)(2)(i) should provide the following information:

(A) The number and location of all retail sales outlets which it has closed or intends to close, the base period volume of each such outlet, the amounts which each such retail sales outlet has certified for ultimate use under an allocation level not subject to an allocation fraction pursuant to § 211.12(d), the supplier for and the terminal facility from which the supplier supplies, each such outlet.

(B) The number and location of all retail sales outlets which the petitioner operates and which will remain open, the base period volume of each such outlet, the supplier for, and the terminal from which the supplier supplies, each such outlet.

(C) A statement that all the retail sales outlets in (A) and (B) are operated by petitioner and that copies of the petition will be filed with all affected FEO regional offices.

(D) Any information, documentation, and arguments which tend to establish that a grant of the petition would not result in an inequitable distribution of gasoline in the market areas served by the petitioner.

Pending review of the petition, FEO may order an interim adjustment to the base period use of the retail sales outlets which the petitioner will continue to operate. An interim adjustment will be made in the same manner as the final adjustment described in paragraph (c) of this ruling, except that the interim adjustment shall take into account only those outlets which the petitioner has actually closed between June 1, 1974, and the date of its petition.

FEO will grant the petitions of independent marketers or small or independent refiners which do not supply their own retail sales outlets unless substantial imbalances in the distribution of motor gasoline in the markets served by the petitioner would result. In compelling circumstances, FEO will grant the petitions of independent marketers, or small or independent refiners, which supply their own retail sales outlets.

FEO may consult the appropriate State Office with respect to the effect of the closing of a retail sales outlet

within a State and may refuse to grant relief under § 211.106(c)(2)(i) with respect to an adjustment based upon a retail outlet closed or to be closed or may condition any relief under § 211.106(c)(2)(i) upon the petitioner's continued operation of one or more of the retail sales outlets which it has closed or would otherwise close. Final adjustments will be made as provided in paragraph (c) of this ruling.

(b) *Petitions from entities other than independent marketers or small or independent refiners.* FEO will also entertain § 211.106(c)(2)(i) petitions from entities other than independent marketers or small or independent refiners which operate retail sales outlets closed or to be closed after June 1, 1974. Such petitioners must provide the same information required of a petitioner under paragraph (a) of this ruling. However, FEO would note that such petitions will be granted only in extraordinary circumstances. The allocation regulations currently have the effect of redistributing the allocation entitlements of closed retail sales outlets among all the purchasers of such petitioners without regard to whether they are operated by the petitioner. FEO would grant adjustments, therefore, only where it is necessary to maintain adequate distribution of supplies in a region or market area. Petitioners must be prepared to demonstrate that the shift of allocation entitlements from a retail outlet closed or to be closed to identified retail outlets to continue in business is necessary to prevent shortages in the market area served by the retail sales outlet closed or to be closed and will not adversely affect purchasers from the retail sales outlets closed or to be closed whose use is under an allocation level not subject to an allocation fraction. No adjustment will be granted this class of petitioners until FEO has issued a written determination based upon the application. Adjustments will be made as provided by paragraph (c) of this ruling.

(c) *Final adjustments.* Upon taking final action on a petition pursuant to § 211.106(c)(2)(ii), FEO will adjust the base period volumes of petitioner's retail sales outlets as follows: First, FEO will aggregate the petitioner's

retail outlets (including those closed or to be closed) by supplier. In those cases where a supplier furnishes motor gasoline to the petitioner's retail sales outlets from more than one terminal facility, FEO will aggregate the petitioner's retail outlets by terminal facility. Second, FEO will adjust the base period volumes of each separate aggregate group of retail sales outlets which are to continue in business. The sum of the base period volumes of the retail sales outlets closed or to be closed for which FEO will permit an adjustment and included within an aggregate group of retail sales outlets will be apportioned among the retail sales outlets within that aggregate group which the petitioner will continue to operate in the same proportion as the base period volume of each such retail outlet bears to the sum of the base period volumes of all the retail sales outlets in that group which the applicant will continue in business.

FEO will not reassign amounts certified by a retail sales outlet closed or to be closed pursuant to § 211.12(d) as being for ultimate use under an allocation level not subject to an allocation fraction.

FEO may, in lieu of the foregoing, adjust the base period volume of particular retail sales outlets to increase supplies in a market area served by the petitioner provided that such outlets are supplied by the same supplier which supplies the retail sales outlet closed or to be closed.

2. *Applications for reassignment of allocation entitlement.* Section 211.106(b)(3)(i) provides that a supplier's obligation to supply gasoline must be determined separately for each retail sales outlet which it supplies, regardless of whether it operates the outlet. Therefore a supplier may not reassign all or part of an allocation entitlement from one outlet to another, including reassignment among its own operated outlets, unless (1) the supplier is an independent marketer or a small or independent refiner; or (2) the supplier has received written permission from FEO to reassign allocation entitlements among its own outlets.

Section 211.106(b)(3)(ii) provides that an independent marketer or small

or independent refiner may reassign up to twenty percent of the allocation entitlement of a retail sales outlet (excluding amounts certified pursuant to § 211.12(d) for ultimate use under an allocation level not subject to an allocation fraction) which it operates to its other retail sales outlets provided such reassignment does not result in an increase of more than twenty percent in the entitlement (excluding amounts certified pursuant to § 211.12(d) for ultimate use under an allocation level not subject to an allocation fraction) of any other retail sales outlet which it operates. If the independent marketer or small or independent refiner is not the supplier of some or all of its retail sales outlets which it operates, the independent refiner or small or independent refiner may reassign allocation entitlements only among its retail sales outlets which are supplied by the same supplier and terminal facility. FEO's intention is to maintain the competitive market position of independent marketers, or small or independent refiners by keeping volumes within their distribution system. The movement of specific quantities of motor gasoline from one outlet to another in excess of that permitted by § 211.106(b)(3)(ii) therefore, will be granted only in unusual circumstances, since FEO intends to discourage shifts of product which may aggravate fuel imbalances within regions and among market areas.

FEO believes that the twenty percent reassignment under § 211.106(b)(3)(ii) permitted independent marketers or small or independent refiners is adequate for all but the most unusual cases. An independent marketer or small or independent refiner which wants to increase or decrease the allocation entitlement of any retail sales outlet which it operates other than as provided by § 211.106(b)(3)(ii) must petition FEO under § 211.106(b)(3)(i) for permission to do so.

Any operator of retail sales outlets, including independent marketers or small or independent refiners which desire to reassign amounts in excess of 20 percent, and which operates more than one retail sales outlet may petition FEO for permission to reassign al-

location entitlements among its outlets. Such a petition shall be filed with the regional FEO office in which the outlets concerned are located, and shall specify the location of the outlets, the base period volumes or adjusted base period volumes of the outlets, amounts certified by the retail outlet pursuant to § 211.12(d) for ultimate use under an allocation level not subject to an allocation fraction, amounts of gasoline which the applicant proposes to reassign and the outlets to which amounts are to be reassigned and from which amounts are to be delivered. The petition shall also identify the retail sales outlets to which all or part of an allocation entitlement is to be shifted, the outlets from which the entitlements are to be diverted, and the amounts involved. The petition shall state the reasons for the proposed reassignment, and any data, documentation or other information in support of the petition.

The petition may be granted only if FEO determines that the reassignment is necessary to preserve the competitive market position of an independent marketer or small or independent refiner and that inequitable distribution of gasoline in the market area served by the petitioner will not result from the reassignment. In the case of petitioners other than independent marketers, or small or independent refiners, a petition will be granted only if the reassignment is necessary to improve gasoline supplies in the market areas served by the retail outlets whose base period use would be increased and would not result in shortage of supply in the market areas of the retail outlet from which the assignment is to be made. Adjustments under this section shall be for a period and in amounts determined by FEO.

3. *Petitions for treatment of retail outlets as a single firm.* Section 211.106(b)(1) provides that each firm or part of a firm which operates a retail sales outlet shall be considered a separate firm with respect to each retail sales outlet and therefore a separate wholesale purchaser-reseller. An exception is provided to the provisions of § 211.106(b)(1) for independent marketers and small and independent re-

finers. As noted previously, FEO anticipates that proper use of § 211.106(c)(2) and § 211.106(b)(3) will provide adequate relief for most petitioners which might otherwise seek relief under § 211.106(b)(2). Consequently, FEO anticipates that petitions to treat some or all of the petitioner's retail sales outlets as a firm will only be granted in unusual circumstances.

An independent marketer or small or independent refiner may petition for treatment as a single firm only those retail outlets which it actually operates. A retail sales outlet in which the petitioner merely holds a real property interest, including a lease, but which is operated by another entity, may not be included among the retail outlets to be included to the petitioner's firm. Only those retail outlets supplied from the same terminal facility may be treated as a separate firm.

If the independent marketer or small or independent refiner supplies retail sales outlets other than those which it operates, its obligation to supply those other outlets shall in no way be diminished by a grant of its petition. An independent marketer or small or independent refiner which supplies its own operated outlets also will not be relieved of its obligation under § 211.106(d)(3) to report to FEO whenever it ceases to supply any retail sales outlet including those aggregated for treatment as a single firm, or of its obligation to obtain FEO assignment of a supplier/purchaser relationship and a base period volume for any new retail sales outlets which it intends to supply as provided by § 211.12(e).

A petition for treatment of retail sales outlets as a single firm must demonstrate that allowance of the petition will not result in an inequitable distribution of gasoline in the market areas served by the petitioner. A petition must be fully supported by detailed facts, figures and other relevant documentation and information, including the following.

(1) The number and location of the retail sales outlets which the petitioner proposes to treat as a single firm, including a map showing such loca-

tions, and a statement that such outlets are operated by the petitioner.

(2) The number and location of retail sales outlets which the petitioner has closed during the preceding six months, if any.

(3) The number and location of retail sales outlets which the petitioner intends to close during the next 12 months, if any.

(4) The name of the supplier of each of the retail sales outlets to be treated as a single firm and the terminal facility from which the outlets are supplied.

(5) The base period volume or adjusted base period volume of each retail sales outlet.

(6) The actual volume of motor gasoline sold by each such retail sales outlet during the period January 1 through March 31, 1972, and during the period January 1 through March 31, 1974.

(7) Information concerning the anticipated effect which a grant of the petition would have on the petitioner's customers, including any priority customers such as agricultural users, the petitioner's employees, transportation costs and other relevant matters.

(8) The reasons why relief under § 211.106(b)(3) and (c)(2) has not been adequate in the petitioner's case.

(9) Any other information, documentation, and arguments which tends to establish that allowance of the petition would not result in an inequitable distribution of gasoline in the market areas served by the petitioner.

FEO will not grant a petition for treatment of some or all of a petitioner's retail outlets as a firm or firms unless the petitioner demonstrates that separate treatment of such outlets would tend to lessen its competitive market position, that such treatment as a single firm will not result in an inequitable distribution of gasoline in the market areas served by the petitioner, and that ultimate users of motor gasoline served by petition under an allocation level not subject to an allocation fraction will not be adversely affected. FEO may refuse to include some or all of a petitioner's outlets within a firm or firms.

FEO will grant such petitions only on the following conditions:

(1) A firm will include only those retail outlets which have a common supplier and are supplied from the same terminal facility.

(2) A firm may not shift more than a fixed percent of a retail outlet's base period use (excluding amounts certified pursuant to § 211.12(d) for ultimate use under an allocation level not subject to an allocation fraction) within a month to another retail outlet or retail sales outlets within the firm.

(3) A firm may not shift to a retail outlet within a firm more than a fixed percent of its base period use within a month from another retail outlet or retail outlets within the firm.

(4) A firm may not shift product from itself to another firm.

(5) A firm may not close or open a retail sales outlet without FEO permission.

Petitions for treatment of retail sales outlets as a single firm or firms may be granted or denied in whole or in part, and a grant may be made conditional on certain actions by the petitioner, such as reopening a retail sales outlet in an area which is not adequately served. In addition, the grant of such a petition may be modified or revoked by FEO if such action becomes necessary to fulfill the objectives of the allocation program.

[39 FR 18638, May 29, 1974]

RULING 1974-14—BASE RENT REGULATIONS

Facts. Firm A, a refiner, owns Station X which it leases to Firm B, a retailer of gasoline supplied by Firm A. Upon the expiration of Firm B's lease, Firm A leases the station to Firm C at a rent in excess of the base rent that was paid by Firm B.

Issue. Is the increase in rent to Firm C for the use of Station X to an amount in excess of the base rent that was charged to Firm B for the use of Station X a violation of § 212.103?

Ruling. Yes. Section 212.103 prohibits an increase in base rent for property used in the retailing of gasoline, where both the lessor and lessee are refiners, resellers, reseller-retailers, or retailers. "Base rent" is defined in § 212.102, as the rent charged for that

station pursuant to the contractual terms prevailing on May 15, 1973. Thus, as long as Station X is a property used in the retailing of gasoline, and as long as the parties to the lease agreement (Firm A and Firm C) are refiner and a retailer, the "Lessor" regulations of Subpart G are applicable.

Thus, a change in the identity of the retailer, or the fact that a new lease agreement has been entered into, does not affect the requirement of § 212.103 that the rent for Station X not be increased to an amount in excess of the base rent.

[39 FR 20056, June 6, 1974]

RULING 1974-15—PORTABLE SANITATION INDUSTRY

Facts. Firm A is engaged in the delivery, maintenance, and servicing of portable sanitation facilities to locations at which no permanent toilet facilities are available, such as construction sites, sporting events, recreation areas and the scenes of natural disasters and accidents. Firm A delivers and installs portable chemical toilets and provides regular maintenance of the units, including pumping and disposal of the toilet effluent and furnishing fresh chemicals, toilet paper, deodorant blocks and other supplies.

Issue. Is Firm A engaged in "sanitation services," as defined in § 211.51 of the Mandatory Petroleum Allocation Regulations (10 CFR 211.51), for purposes of determining the allocation level under which it is entitled to purchase motor gasoline?

Ruling. Yes. As defined in § 211.51, "sanitation services" means "the collection and disposal for the general public of solid wastes, whether by public or private entities, and the maintenance, operation and repair of liquid purification and waste facilities during emergency conditions." In its business, Firm A collects and disposes of solid wastes for the general public at sporting events and recreational areas. In addition, although equipment installed and maintained at construction sites is primarily for the use of the parties involved in the construction project, such facilities are frequently available for the use of the general public. At times Firm A is called upon to maintain and operate

waste facilities during emergency conditions, such as those prevailing after floods, storms and other natural disasters, or at scenes of accidents or rescue operations. Firm A is therefore engaged in sanitation services as defined under the Mandatory Petroleum Allocation Regulations.

The allocation level for sanitation services is one hundred percent of current requirements, subject to the supplier's allocation fraction. Firm A is therefore entitled under § 211.103(c) (1)(iii) to purchase one hundred percent of its current requirements of motor gasoline, reduced by an allocation fraction, if it is a wholesale purchaser-consumer as defined in § 211.51, or a bulk purchaser as defined in § 211.102, subject to any other applicable provisions of the regulations.

[39 FR 21042, June 18, 1974]

RULING 1974-16—ALLOWABLE USE OF MULTIPLE ALLOCATION FRACTIONS

Section 211.10(b), Chapter II of Title 10, Code of Federal Regulations, requires suppliers to have a single allocation fraction for all purchasers except to the extent permitted by § 211.14 or unless permitted or required by order of the FEO. Suppliers with two or more distribution subsystems or regions independent of one another may petition the National FEO for permission to use multiple allocation fractions whenever use of a single fraction would be impracticable or inconsistent with the objectives of the Mandatory Petroleum Allocation Program.

FEO has concluded that suppliers which are engaged in distribution of allocated products both in the 48 contiguous States and in Alaska, Hawaii, or any territory or possession of the United States will be able to justify the use of multiple allocation fractions under § 211.10(b) because of geographical considerations. FEO will therefore permit the use of allocation fractions for Alaska, Hawaii, or any territory or possession of the United States which are different from the single fraction used for the 48 contiguous States, without the filing of a petition otherwise required by § 211.10(b).

A supplier which uses multiple allocation fractions pursuant to this

ruling must notify FEO if its allocation fraction in Alaska, Hawaii, or any state, territory or possession of the United States exceeds by 0.3 or more or falls below the allocation fraction of the supplier used in the 48 contiguous States. If it appears that a supplier's allocation fraction in any such area varies greatly from its allocation fraction in its distribution subsystem or subsystems in the 48 contiguous States, or is otherwise impracticable or inconsistent with the objectives of the Mandatory Petroleum Allocation Program, FEO may require the supplier to submit information justifying its practice, and may order modification of the allocation fractions used, including the use of a single allocation fraction for all purchasers.

[39 FR 21042, June 18, 1974]

RULING 1974-17—BASE PRICE COMPUTATION

Facts. Firm R is a refiner of covered petroleum products subject to the Mandatory Petroleum Price Regulations of the Federal Energy Office (10 CFR Part 212). Under Subpart E of Part 212, to determine its lawful selling prices, Firm R must first compute its base prices. The base price for sales of an item by a refiner is defined in 10 CFR 212.82(f) as the "weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973" plus increased product costs incurred since that date.

Firm R computes its weighted average May 15, 1973 selling price for a product sold to a particular class of purchaser. Firm R, however, does not determine prices to individual customers within that class of purchaser by use of this weighted average May 15, 1973 selling price. Instead, to determine its "base prices," Firm R adds an equal amount of increased product costs to each May 15, 1973 selling price to each individual customer within that class of purchaser, and thereby maintains the price differences between customers within that class of purchaser which existed on May 15, 1973. By so doing, Firm R asserts that it is maintaining a weighted average May 15, 1973 selling price, plus increased product costs, even though some of the firm's sales to customers

within that class are now at prices above, and some are now at prices below, the actual weighted average May 15, 1973 selling price, plus increased product costs.

To illustrate, Firm R's base price determination for sales of a product to a particular class of purchaser may be represented as follows, assuming that each customer within the class was sold an equal number of units on May 15:

[In cents]

Customers in a class of purchaser	May 15 selling price	Weighted avg. price	Increased product cost	Base price	New unit price charged
A.....	10				12
B.....	11	11	2	13	13
C.....	12				14
Average.....					13

The price to B was Firm R's prevailing market price on May 15, 1973; the lower price to A was due to a special, temporary deal in effect on May 15; and the higher price to C was caused by the provisions of a short-term agreement under which C purchased its product. These price differences within the same class of purchaser were random differentials. They did not constitute customary price differentials, which would have served to establish separate classes of purchaser, because they were not consistently and historically applied price distinctions based on differences in volume, grade, quality, or location or type of purchaser or a term or condition of sale or delivery.

Issue. Has Firm R correctly applied the FEO price regulations?

Ruling. No. Firm R's efforts to "maintain" price differences among its customers within a particular class of purchaser are not permitted by FEO price regulations. When a seller computes its base prices, those are established with respect to a "class of purchaser." Section 212.31 defines a "class of purchaser" as "purchasers or lessees to whom a person has charged a comparable price for a comparable property or service pursuant to cus-

tomary price differential between those purchasers or lessees and other purchasers or lessees." A class of purchaser is, therefore, the smallest unit for which a uniform selling price may be computed because, by definition, no customary price differentials exist within a class of purchaser. It should be noted, however, that a class of purchaser may consist of only a single customer, if that particular customer alone was charged a comparable price for a comparable property or service pursuant to a customary price differential between the customer and all other customers.

The base price computed for a class of purchaser must be a single price for all customers within that class of purchaser. In the case of Firm R, the base price for customers A, B, and C is 13 cents. By charging a unit price of 14 cents to Customer C, Firm R is charging a price in excess of the base price which would only be permissible if prenotified and cost-justified pursuant to the provisions of § 212.82(c)-(k). The same general principles also apply to the calculation of lawful selling prices under 10 CFR 212.93.

[39 FR 21043, June 18, 1974]

RULING 1974-19—GASOLINE; DISCOUNTED MAY 15, 1973 PRICE TO A CLASS OF PURCHASER

Facts. G&M, a firm engaged in refining and marketing petroleum products, distributes its gasoline products in retail sales through its own retail stations and through sales to branded and unbranded independent sellers. G&M establishes the tankwagon and terminal prices for the gasoline to be sold within specified areas. On May 15, 1973, G&M sold gasoline to Company A, a branded independent retailer, which operated a high volume retail outlet in a favorable location, at a net price which was 1½ cents per gallon less than G&M's established tankwagon price in that area. G&M regularly extended this type of competitive discount or allowance to various retailers for a variety of reasons. Company A's discount was a competitive inducement for it to continue to purchase gasoline from G&M. In this case, Company A received the discount by a contract addendum made on January 1, 1973, which was to be in effect for

an indefinite period, subject to discontinuance upon notice by G&M.

On May 15, 1973, another branded independent retailer, Company B, also received a discount of 1½ cents off G&M's tankwagon price for its gasoline. The discount to Company B was first placed in effect on April 15, 1973, and represented a form of subsidy to Company B (and to other retailers in Company B's pricing zone) for the purpose of alleviating the impact of a "price war" situation. The discount to Company B was not intended to be of indefinite duration, but was intended to be temporary and to remain in effect only for as long as the "price war" situation lasted.

On June 1, 1973, G&M notified all its purchasers that no further sales of gasoline would be made at less than the tankwagon price.

Issue. May G&M discontinue these discounted sales to its purchasers under the price regulations of the Federal Energy Office?

Ruling. G&M's discount to Company A may not be discontinued under FEO regulations. G&M is not, however, required by FEO rules to maintain the discount to Company B.

G&M must calculate its base prices according to the rule of 10 CFR 212.82(f). This price rule requires that G&M establish a weighted average May 15, 1973 selling price to each "class of purchaser." To determine a class of purchaser, 10 CFR 212.31 requires that G&M identify those "purchasers . . . to whom [G&M] has charged a comparable price for comparable property . . . pursuant to customary price differentials between those purchasers . . . and other purchasers . . ." Section 212.31 identifies a customary price differential to include a price distinction based on a discount.

In the case of Company A, the tankwagon price is not the appropriate price to apply when calculating the base price under § 212.82 because that Company customarily paid a price less than the tankwagon price. Company A could not, therefore, be included in any class of purchaser which is charged the tankwagon price. The lower price based on a discount, which Company A customarily paid, estab-

lishes Company A as a member of a class of purchaser separate from those purchasers which customarily paid the tankwagon price.

Company B, however, may be included in the class of purchaser which includes persons customarily paying the full tankwagon price. The reason that Company B's lower May 15, 1973 price need not be separately maintained in a separate class of purchaser is that the discount price to Company B was intended to be temporary and did not, therefore, constitute a "customary price differential." Thus, although a price discount existed on May 15, 1973, for Company B, the discount was not a customary price differential but was limited to the situation in which a price "war" prevailed. After that time, G&M intended to return Company B's price to the tankwagon price level. Because of the temporary duration of the discount in this case, the fact that there was a discount on May 15, 1973 does not serve to establish a "customary" price which might distinguish Company B from other purchasers in the class otherwise associated with Company B.

As a further means of distinguishing between temporary and customary discounts, FEO will generally regard any discount that was in effect on May 15, 1973, and that had either been in effect or had been granted for a period of six months or more, to be a customary discount. This presumption may be rebutted in particular situations by appropriate factual showing.

The price rule of 10 CFR 212.82(f) nevertheless requires G&M to take into account the fact that a discount price was paid by Company B on May 15, 1973. The refiner's price rule of § 212.82(f) requires that in determining a lawful May 15, 1973 weighted average selling price to a class of purchaser, G&M may not exclude any temporary special sale, deal or allowance which was then in effect. The application of § 212.82(f) should therefore result in a weighted average May 15, 1973 selling price computed by including among the class of purchaser customarily paying the full tankwagon price, those customers temporarily paying a price which is lower than the May 15, 1973 tankwagon price. Compa-

ny B's May 15, 1973 discount price, therefore, would be averaged with the May 15, 1973 selling prices to all other members of the class of purchaser to which Company B would belong if it had received no discount.

In summary, FEO price regulations require that price differentials customarily extended must continue in effect to members of those classes of purchaser which are identified by such customary price differentials. These same principles govern the price rules for resellers and retailers under 10 CFR 212.93.

[39 FR 21043, June 18, 1974]

**RULING 1974-19—COMPETITIVE BIDS; SUPPLIER/
PURCHASER RELATIONSHIP**

Facts: County A, located in State B, historically solicited competitive bids from fuel suppliers for middle distillate which it uses for heating fuel. State B's laws and County A's ordinances required County A to procure such supplies by soliciting competitive bids. For the year 1972, Firm C was the successful bidder to supply County A's requirement of middle distillate. Firm D was the low bidder for 1973 and 1974. County A purchased in excess of 84,000 gallons of middle distillate in 1972.

County X, also located in State B, has historically solicited competitive bids from fuel suppliers for middle distillate which it uses for heating fuel. County X's ordinances also require County X to procure such supplies by soliciting competitive bids.

For the year 1972, Firm Y was the successful bidder to supply County X's requirements of middle distillate. Firm Z was the low bidder for 1973 and 1974. County X has never purchased more than 75,000 gallons of middle distillate in any calendar year subsequent to 1971.

Issues: (1) Is Firm D or Firm C the middle distillate supplier of County A under the Mandatory Petroleum Allocation Program? (2) Is Firm Y or Firm Z the middle distillate supplier of County X under the Mandatory Petroleum Allocation Program?

Ruling: The mandatory allocation regulations in 10 CFR Part 211 provide no exemption for Federal, State

or local governments. Therefore, County A, County X and State B are fully subject to all the provisions of that Part. The competitive bid requirements of the laws and ordinances of State B, County A, and County X are superseded to the extent they are inconsistent with the allocation regulations.

Since County A and County X are ultimate consumers of middle distillate, the supplier/purchaser relationship imposed by the allocation regulations will depend on whether they are end-users or wholesale purchaser-consumers.

County A as a wholesale purchaser-consumer. County A is a wholesale purchaser-consumer since it is an ultimate consumer:

... which as part of its normal business practices, purchases or obtains an allocated product from a supplier and receives delivery of that product into a storage tank substantially under ... (its) control at a fixed location and ... purchased or obtained more than 84,000 gallons of that allocated product in any calendar year subsequent to 1971. (§ 211.51.)

Since County A is a wholesale purchaser-consumer its supplier/purchaser relationships will be determined by reference to § 211.9(a) which provides that wholesale purchaser-consumers shall be supplied by their base period suppliers. The base period for middle distillate is the month of 1972 which corresponds to the current month (§ 211.122). County A will therefore be supplied by Firm C rather than Firm D since Firm C was County A's 1972 supplier. Section 211.9(a)(2)(ii) provides that such a supplier/purchaser relationship shall be maintained for the duration of the Mandatory Petroleum Allocation Program unless otherwise provided by FEO's regulations or directed by FEO "... and may not be revised or otherwise terminated except that such relationship may be terminated by the mutual consent of both parties."

Consequently, Firm C will be County A's supplier for 1974 and for the duration of the Mandatory Petroleum Allocation Program, unless FEO assigns County A a different supplier pursuant to § 211.12(e) (1) or (3).

Section 211.12(e)(1) provides that wholesale purchaser-consumers without a base period supplier or a new supplier as provided in § 211.10(e)(1) can make mutually acceptable arrangements with suppliers subject to FEO approval. Since County A has a base period supplier (Firm C), it cannot make a mutually acceptable arrangement with a supplier pursuant to § 211.12(e)(1).

Section 211.12(e)(3) provides in part that FEO may assign a supplier to a wholesale purchaser-consumer whose base period supplier is unable to supply it with sufficient amounts of an allocated product. This provision may not be used in circumstances where the base period supplier is able to supply sufficient quantities of product even if the supplier charges higher lawful prices than a wholesale purchaser-consumer would like to pay or higher prices than another supplier might charge.

In those circumstances where FEO considers an assignment pursuant to § 211.12(e) (1) or (3) FEO will take into account such factors as the supplier's allocation fraction, the allocation fraction of other suppliers which could supply the wholesale purchaser-consumer, and whether an assignment will affect the competitive position of any independent marketer, or small or independent refiner or would be otherwise inconsistent with the objectives of the Emergency Petroleum Allocation Act of 1973. The fact that a wholesale purchaser-consumer is a governmental entity required by State and local law to procure supplies at the lowest price will not be a controlling factor in assigning a new supplier to a wholesale purchaser-consumer without a base period supplier. The regulations are intended to be applied equitably such that the burden of fuel shortages will be borne without regard to whether a governmental agency or a private citizen is involved.

County A, of course, is free to procure supplies from any supplier which certifies that it has excess product to distribute and that it has complied with the provisions of § 211.10(g) of FEO's regulations. Thus, County A on a month-to-month basis could attempt to secure its supplies from such suppli-

ers. However, FEO cautions that County A will not know from month-to-month which suppliers will be able to make such a certification. Further, County A will not be able to anticipate whether such suppliers' prices will be higher than or lower than Firm C's.

County X as an end-user. Unlike County A, County X is an end-user rather than a wholesale purchaser-consumer since it has not purchased or obtained more than 84,000 gallons of middle distillate in any calendar year since 1971.

An end-user is "any firm which is an ultimate consumer of an allocated product other than a wholesale purchaser-consumer." (§ 211.51.)

Since County X is an end-user, its supplier/purchaser relationships are specified by § 211.9(b) which provides as follows:

Each supplier of an allocated product shall, to the maximum extent practicable, supply all end-users which purchased that allocated product from that supplier as of January 15, 1974, and which are entitled to an allocation level under the provisions of Subparts D through K of this part.

As an end-user, County X may apply as a new end-user to a supplier other than its supplier on January 15, 1974. Section 211.12(f) provides:

(1) Suppliers to the maximum extent possible shall accept new end-users where such purchaser, under normal business practices, could logically have been served by the supplier in accordance with its base period business practices. Suppliers shall allocate to new end-users in a manner consistent with the allocation methods set forth in this chapter.

(2) If the supplier and new end-user cannot agree on an allocation requirement for the end-user or if the end-user cannot locate a supplier, the end-user may apply to the appropriate State office in accordance with the procedure specified in Subpart I of Part 205 of this chapter. In this event, the new end-user shall certify to the State office documented evidence justifying the proposed allocation requirement as normal and reasonable for the intended use.

County X may therefore solicit bids from suppliers of middle distillate such as Firm Z, and Firm Z could under FEO's regulations supply County X.

[39 FR 22133, June 20, 1974]

RULING 1974-20—ADDITIONAL USE OF A PROPERTY USED IN THE RETAILING OF GASOLINE

Facts. Firm A, a refiner, owns property that on May 15, 1973 was leased to a retailer and utilized exclusively for the retail marketing of gasoline. The lease has expired and Firm A wants to lease the site for use in the retailing of gasoline, and to add a retail convenience store on the site that was covered by the prior lease. The proposed additional use of the site will involve substantial additional costs to Firm A for the construction of an additional building within the boundaries described in the prior lease.

Issue. What rental limitations are applicable to a new lease of the property, after the convenience store has been added?

Ruling. A new lease agreement is subject to Subpart G (Lessors) of Part 212, which, pursuant to § 212.101, applies to "each leased real property used in the retailing of gasoline where both the lessor and lessee are refiners, resellers, resellers-retailers, or retailers . . .", and which provides in § 212.103 that the rent for such a property may not be increased to an amount in excess of the base rent. Base rent is defined in § 212.102 as "the rent charged for that station pursuant to the contractual terms prevailing on May 15, 1973."

However, in the case of Firm A, where a property is substantially altered to provide for a substantial additional and different use, the resulting property may be properly treated under the "new item" rule of § 212.111(a), since a parcel of real property which has been extensively altered so as to add a convenience store outlet in the manner described for Firm A is not "in the same or substantially similar form," even though gasoline continues to be sold on the property, and since the renovated property is "substantially different in purpose (and) function."

Firm A, therefore, may determine the base rent under the provisions of the "new item" rule which are specifically applicable to "new real property." Section 212.111(b)(2) provides that "a firm offering a lease in a new

real property used in the retailing of gasoline shall determine the base rent for that real property as the average rent charged on May 15, 1973, for the most nearly similar real property used in the retailing of gasoline leased to the same market by other firms leasing real property used in the retailing of gasoline in the same geographic area."

[39 FR 22134, June 20, 1974]

RULING 1974-21—EXCHANGES OF REFINED PETROLEUM PRODUCTS FOR CRUDE OIL

Facts. Under the terms of a contract in effect on December 1, 1973, Firm A was supplying Firm B with a certain volume of domestic crude oil. Pursuant to its terms, the contract expired on January 1, 1974. Under the contract, in exchange for deliveries of crude oil, Firm B was required to sell to Firm A specified amounts of various petroleum products refined from the crude oil. All but one of such products is subject to the provisions of the Mandatory Petroleum Allocation Regulations (10 CFR Part 211).

Issue. Is Firm B required to continue exchanges of refined petroleum products with Firm A on the December 1, 1973 contractual basis under the supplier/purchaser relationship provisions of 10 CFR § 211.63(a)?

Ruling. Under § 211.63(a), Firm B is entitled to be supplied with crude oil by Firm A in accordance with the December 1, 1973 supplier/purchaser relationship between such firms. Section 211.63(a) provides in part that "... all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program * * *." Section 211.63(a) relates only to sales, purchases, and exchanges of domestic crude oil and does not encompass any refined petroleum products within the scope of the supplier/purchaser relationships referred to therein. Thus, § 211.63(a) does not by its terms require that any such exchange relationships remain in effect.

To the extent that refined petroleum products are the subject of exchange agreements for domestic crude oil in effect on December 1, 1973, the

delivery thereof in exchange for crude oil would be governed by provisions of the regulations which regulate the allocation of such products. For example, if distillate were required to be exchanged for the crude oil under the terms of a contract in effect on December 1, 1973, deliveries of the distillate called for under the contract would be permitted only to the extent consistent with the supplier/purchaser rules of Subpart A of Part 211 and the provisions of Subpart G of Part 211 governing allocation of middle distillates. To the extent nonallocated products (such as, for example, asphalt) are involved in any such exchanges, the exchange of such products would be governed by the terms of the December 1, 1973 contract in effect between the parties. This is necessarily the case since FEO regulations apply only to products subject to allocation under the Emergency Petroleum Allocation Act of 1973 and the exchange agreement is preempted only as to those products. Therefore, upon expiration of any such contract the exchange of the non-allocated products would no longer be a condition to deliveries of crude oil under § 211.63(a). Compensation for these deliveries of crude oil would thereafter be governed by the price regulations in Part 212.

In this instance Firm A was delivering domestic crude oil to Firm B pursuant to a supplier/purchaser relationship in effect under contract on December 1, 1973. Under § 211.63(a), this supplier/purchaser relationship for crude oil is required to remain in effect, notwithstanding the fact that the related contract between such firms expired on January 1, 1974. As to the refined petroleum products exchanged for crude oil under the contract between Firm A and Firm B, the exchange of the products which are subject to allocation under the regulations would be governed by the provisions of the regulations applicable to the particular product and not by § 211.63(a). Whether those exchanges would be permitted to operate would be dependent upon whether or not they conform to the allocation regulations for each refined petroleum product. In addition, as to exchange of the

one nonallocated product, the related contract has expired, and such exchange is not included as part of a supplier/purchaser relationship for purposes of § 211.63(a).

Thus, Firm A is required to continue deliveries of crude oil to Firm B on the December 1, 1973 basis, and Firm B is not required to exchange products for crude oil with Firm A in order to preserve the flow of crude oil under § 211.63(a), except to the extent that Firm A possesses an entitlement under the regulations to any of the allocated products exchanged for crude oil. To the extent that the exchange obligations of Firm B under the contract are overridden by operation of the allocation program or have expired by the terms of the contract, Firm B must compensate Firm A for deliveries of crude oil pursuant to the price regulations in Part 212.

[39 FR 24359, July 2, 1974]

RULING 1974-22—SUPPLIER/PURCHASER RELATIONSHIPS APPLYING TO THE DEPARTMENT OF THE INTERIOR

Facts: Under the terms of a lease in effect on December 1, 1973, between Firm A and the Department of the Interior, Firm A undertook to extract crude oil from property under the control of the Department of the Interior. Under the terms of the lease, Firm A is entitled to part of any crude oil produced and the Department of the Interior is entitled to the remainder, which is "royalty oil." The Department of the Interior agreed under the lease to sell its royalty oil to Firm A subject to Interior's right under certain conditions to direct that the royalty oil be sold to other firms. On December 1, 1973 Firm A was receiving the royalty oil under the terms of the lease. Subsequent to December 1, 1973, the Department of the Interior directed Firm A to sell the royalty oil to Firm B.

Issue: Under the supplier/purchaser relationship provisions of 10 CFR 211.63 may the Department of the Interior direct that the royalty oil be sold to Firm B?

Ruling: The mandatory allocation regulations in Part 211 provide no exemption for the Federal government. Therefore, the Department of the In-

terior is fully subject to all the provisions in that part. Section 211.63(a) provides that "all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program * * *"

If the Department of the Interior is permitted to direct the sale of its royalty oil to Firm B, the supplier/purchaser relationship existing on December 1, 1973 between Firm A and the Department of the Interior with respect to the royalty oil would be terminated. Accordingly, the Department of the Interior's direction to transfer the royalty oil from Firm A to Firm B will not be given effect, except to the extent that the supplier/purchaser relationship is terminated pursuant to § 211.63(a) (1) or (3). Section 211.63(a)(1) allows both parties to mutually terminate a relationship, and § 211.63(a)(3) provides that § 211.63(a) does not apply to the seller of any crude oil if the present purchaser, after notice by the seller, refuses to meet any bona fide offer made by another purchaser to buy that crude oil at a lawful price above the price paid by the present purchaser.

This ruling would not be changed if the Department of the Interior had directed Firm A prior to December 1, 1973 to sell the royalty oil to Firm B at a time subsequent to December 1, 1973. Under such circumstances the supplier/purchaser relationship between Firm A and the Department of the Interior would have still existed on December 1, 1973.

[39 FR 25228, July 9, 1974]

RULING 1974-23—CAR WASH SALES OF GASOLINE

Facts. Firm A is a company engaged in the operation of a car wash facility and in the retail sale of gasoline. Firm A's normal business practice, established prior to January 15, 1974, was to sell gasoline only to customers of its car wash facility.

Firm B is also a company engaged in the operation of a car wash facility and in the retail sale of gasoline. Firm B does not limit its sales of gasoline to customers of its car wash facility, but

makes gasoline available for sale to anyone.

Issue 1. Is Firm A's practice of selling gasoline only to customers of its car wash facility a violation of 10 CFR 210.62(c)?

Issue 2. May Firm A increase the price it charges for car washes?

Issue 3. May Firm B increase the price it charges for car washes?

Ruling. Firm A may continue its practice of making gasoline available for sale only to customers of its car wash facility. 10 CFR 210.62(c) was not intended to require the discontinuance of normal business practices that were established prior to January 15, 1974. This ruling recognizes that such business practices have developed because, in many instances, car wash facilities are constructed so that it is difficult or inconvenient for customers to purchase gasoline and leave the premises without going through the car wash. In addition, car wash facilities often depend heavily on the combined revenues from car washes and the sale of gasoline, so that if a normal business practice of selling gasoline only to car wash customers could not be continued, such businesses would suffer financial hardship.

Firm A, is, however, subject to the price regulations of the FEO as a retailer of gasoline, and in order to insure that the price regulations applicable to the retail sale of gasoline are not circumvented, Firm A may not increase, above the May 15, 1973, the prices it charges for car washes purchased by customers who purchase gasoline. The limitations to May 15, 1973 prices for car washes purchased by customers who purchase gasoline applies both to the maximum price of such car washes and to the terms of any discount schedule in effect on May 15, 1973, whereby the car wash price was reduced according to the quantity of gasoline purchased.

Firm B, which does not require its gasoline customers to purchase car washes, is not subject to any limitation on the price it charges for car washes, and may increase the price over its May 15, 1973 level. However, if Firm B had a discount schedule in effect on May 15, 1973, whereby its car wash price was reduced or eliminated

according to the quantity of gasoline purchased, the discount schedule must be maintained, since the amount of any discount on the car wash price that was received with the purchased of gasoline on May 15, 1973, was part of the product and service received by a purchaser for the May 15, 1973 price, and elimination or reduction of the discount would therefore constitute an impermissible price increase by Firm B.

Some May 15, 1973 discount schedules were stated in terms of dollar amounts of gasoline purchased, rather than in terms of gallons of gasoline purchased. Whether a discount schedule was stated in terms of a dollar amount or a gallon amount was immaterial on May 15, 1973. As a practical matter, car wash operators which had a discount schedule in effect on May 15, 1973, depended on their margin on sales of a given number of gallons of gasoline, whether the schedule was stated in terms of dollar amounts or gallons of gasoline. In order to treat all retailers of gasoline on the same basis under the price regulations, retailers may require currently the purchase of the same number of gallons of gasoline to obtain a specified discount on a car wash price as they did on May 15, 1973, without regard to whether their May 15, 1973 discount schedules were stated in terms of dollars or gallons. Accordingly, a discount schedule stated in terms of dollar amounts on May 15, 1973 may now be stated in terms of the number of gallons of gasoline that could be purchased for the applicable May 15, 1973 dollar amount at May 15, 1973 prices. The foregoing principles are illustrated by the following examples:

Example 1. Firm A sells gasoline only to purchasers of car washes. It also makes car washes available for sale without the purchase of gasoline. On May 15, 1973 Firm A's car wash prices were as follows:

Car wash.....	\$2.00
Car wash with purchase of 5 gallons or more of gasoline.....	1.50
Car wash with purchase of 10 gallons or more of gasoline.....	1.00
Car wash with purchase of 15 gallons or more of gasoline.....	.50

Firm A may increase the price it charges for only those car washes sold to customers who do not purchase gasoline. It may not increase the prices of car washes sold to those who purchase gasoline above the levels listed above, i.e.:

Car wash with purchase of 5 gallons or more of gasoline.....	\$1.50
Car wash with purchase of 10 gallons or more of gasoline.....	1.00
Car wash with purchase of 15 gallons or more of gasoline.....	.50

Example 2. Firm A sells only to purchasers of car washes, and also makes car washes available for sale without the purchase of gasoline, as in Example 1, except that on May 15, 1973, its car wash prices were:

Car wash.....	\$2.00
Car wash with \$1 purchase of gasoline.....	1.50
Car wash with \$3 purchase of gasoline.....	1.00
Car wash with \$5 purchase of gasoline.....	.50

On May 15, 1973, Firm A sold regular gasoline for \$.31 per gallon and premium gasoline for \$.35 per gallon. Its weighted average selling price for a gallon of gasoline on May 15, 1973 was \$.333.

Firm A may increase the price it charges for only those car washes sold to customers who do not purchase gasoline. It may not increase the prices of car washes sold to those who purchase gasoline above the levels listed above, provided that the gallon equivalents of May 15, 1973 dollar amounts may be used, i.e.:

Car wash with purchase of 3 gallons (i.e., \$1 divided by \$0.333) of gasoline.....	\$1.50
Car wash with purchase of 9 gallons (i.e., \$3 divided by \$0.333) of gasoline.....	1.00
Car wash with purchase of 15 gallons (i.e., \$5 divided by \$0.333) of gasoline.....	.50

Example 3. Firm B does not require its gasoline customers to purchase car washes, but on May 15, 1973, it provided discounts on its car wash prices as follows:

Car wash with purchase of 15 gallons or more of gasoline.....	Free
Car wash with purchase of 10 gallons or more of gasoline.....	\$0.50

Car wash with purchase of 5 gallons or more of gasoline.....	1.50
Car wash with no gasoline purchase.....	2.00

Firm B may increase the prices it charges for car washes, provided it continues to make gasoline available for sale to anyone, without regard to whether they purchase a car wash. Firm B must, however, maintain its May 15, 1973 discount schedule. Thus, if the price of a car wash were increased to \$3.00, Firm B could not charge more than \$1.00 for a car wash with the purchase of 15 gallons or more gasoline; \$1.50 with the purchase of 10 gallons or more of gasoline; or \$2.50 with the purchase of 5 gallons or more of gasoline. If Firm B's discount schedule were stated on May 15, 1973, in terms of dollar amounts, it could change those dollar amounts into the equivalent number of gallons, as in Example 2, above.

[39 FR 25472, July 11, 1974]

RULING 1974-24—TRUCK STOP LEASES

NOTE: This Ruling supersedes Ruling 1974-7 on Truck Stop Leases (39 FR 10434, March 20, 1974). On April 30, 1974, FEO amended Subpart G of Part 212 of Title 10 CFR, governing the leasing of real property used in the retailing of gasoline, to reflect a change in FEO's regulatory authority resulting from the expiration of the Economic Stabilization Act of 1970. (39 FR 15139) The April 30, 1974 amendment was adopted in order to bring Subpart G within the scope of the Emergency Petroleum Allocation Act, by limiting the applicability of the "lessors" provision in Subpart G to those situations in which both the lessor and the lessee of real property used in the retailing of gasoline are refiners, resellers, reseller-retailers, or retailers, as defined in Part 212. Consistent with this change in the scope of Subpart G, DOE is issuing this new Ruling to replace Ruling 1974-7 on truck stop leases. The rent charged for a truck stop facility after April 30, 1974, therefore, must conform to this ruling. The rent charged prior to May 1, 1974, must conform to Ruling 1974-7.

Facts. Firm A is the lessee operator of a truck stop facility which provides retail fuel sales of gasoline and diesel fuel, restaurant services, vehicle repair facilities and other sales and service activities. Firm B, a refiner, leases the truck stop facility to Firm A and sup-

plies Firm A with gasoline and diesel fuel.

Firm A leased the real property used for its truck stop facility from Firm B under a single lease which, under the terms prevailing on May 15, 1973, provided for rental of the entire property, with the rent determined under separate formulas as a percentage of total sales revenues of fuel and as a percentage of total sales revenues of other products and services, and subject to a certain minimum dollar amount applicable to the entire lease.

Upon the expiration of this lease on May 1, 1974, Firm B seeks to establish a new lease for the truck stop which (1) increases the rent based on a percentage of total sales revenues of fuel; (2) increases the rent based on a percentage of total sales revenues of products and services other than fuel; and (3) increases the minimum dollar amount above that which prevailed on May 15, 1973.

Issue. Are any of the rent increases in the new lease sought by Firm B permitted under Subpart G of Part 212 of the DOE regulations, as amended?

Ruling. Yes. Firm B may establish a new lease which increases the rent which is based on a percentage of total sales revenues of products and services other than fuel, above that which prevailed on May 15, 1973. However, Firm B may not increase the rent based on a percentage of the total sales revenues of fuel, nor the minimum dollar amount, above the levels which prevailed on May 15, 1973.

FEO Ruling 1974-7 concluded that:

... A lessor of real property used in the retailing of gasoline may not now treat separately uses of real property that were formerly treated in a single lease agreement, nor may it raise the rent with respect to any use of such property beyond the rent charged pursuant to the contractual terms prevailing on May 15, 1973.

... The fact that the old lease provided separate formulas for the rent attributable to the particular uses of the real property does not provide a basis for the lessor to make separate leases for these uses or to increase the rent, either separately or together, for these uses.

This Ruling was correct under the Cost of Living Council Phase IV rules for petroleum product prices which were subsequently incorporated into

the FEO regulations as Subpart G of 10 CFR Part 212. After the expiration of the Economic Stabilization Act, however, FEO's authority to control rents for the non-fuel areas or non-fuel uses of the real property used in the retailing of gasoline has been limited to situations in which such rents are so inextricably intertwined with the rent for the fuel area and fuel uses as to make their separation impracticable. For example, Firm B may not increase the minimum dollar amount in the above fact situation because on May 15, 1973, the minimum dollar amount applied to the entire leased property without apportionment between the non-fuel area and the fuel area. Any increase in the minimum dollar amount would, therefore, be an increase in the rent on both the fuel and non-fuel areas of the real property. Firm B may, however, increase the rent based on a percentage of total sales revenues of products and services other than fuel, since this could be done without increasing the rent for the fuel area of the property.

[39 FR 28973, Aug. 13, 1974]

RULING 1974-25—SPOT SALES UNDER PART 211

Facts. During the year 1972, Firm A made sales of motor gasoline to Firm B. Firm A was not the supplier of motor gasoline to Firm B on a regular or continuing basis. Firm A's sales to Firm B were made in order to distribute product not required by Firm A's regular customers at the time of the sales, and Firm B's purchases were for the purpose of rectifying certain of its supply imbalances. The transactions between Firm A and Firm B (herein referred to as "spot sales") did not occur with any regularity during the year 1972.

Issue. Under 10 CFR 211.10(b)(2)(ii) are such spot sales included as part of Firm B's base period use so as to require such sales to be included in Firm A's supply obligation for purposes of 10 CFR 211.10(b)(2)(i)?

Ruling. Section 211.10(b)(2)(ii) provides that a "... wholesale purchaser's base period volume of a particular allocated product is the volume of that allocated product purchased or obtained during the appropriate base

period . . . " The language in this section does not distinguish between purchases made on the basis of a continuing relationship and those made on a spot basis in a base period. In addition, exclusion of spot sales from base period volume would conflict with the purpose of the Mandatory Petroleum Allocation Regulations to assure supplies to wholesale purchaser-consumers and end-users with reference to their supply levels in the appropriate base period, since such exclusion would result in a base-period volume which might not accurately reflect actual supply levels in the base period.

Accordingly, Firm A's sales to Firm B would constitute a part of Firm B's base period use for purposes of § 211.10(b)(2)(ii) and thereby would be included in Firm A's supply obligation to Firm B for purposes of § 211.10(b)(2)(i).

[39 FR 32901, Sept. 12, 1974]

RULING 1974-26—APPLICATION OF THE REFINER'S COST FORMULA OF § 212.83(c) TO REFINERS REQUIRED TO SELL CRUDE OIL UNDER THE ALLOCATION PROGRAM

This ruling is issued to provide guidance to refiners, and particularly refiner-sellers under the Mandatory Crude Oil Allocation Program of Subpart C of Part 211, on the calculation of increased cost of crude oil under Part 212 of the DOE price regulations. To the extent that the principles set forth in this ruling have not been applied by refiners in the past, such refiners will be required to amend their previous Form FEO-96 filings to conform to the principles of this Ruling.

Facts. Firm A, a refiner, purchased or landed 10,000,000 barrels of crude oil during the month of October 1974 for refining and to meet its obligations under the Mandatory Crude Oil Allocation Program (the "buy-sell" program) of § 211.65. Six million barrels were domestic crude oil, purchased at the prices ranging from \$5 to \$10.50 per barrel, and the other 4,000,000 barrels were imported crude oil, landed at costs ranging from \$10 to \$14 per barrel, for a total cost of \$84,000,000 for 10,000,000 barrels. Of the total amount purchased or landed, 2,000,000 barrels of domestic crude oil at a total cost of \$12,000,000 and 2,000,000 bar-

rels of imported crude oil at a total cost of \$24,000,000, were delivered in District V; and 4,000,000 barrels of domestic crude oil at a total cost of \$24,000,000 and 2,000,000 of imported crude oil at a total cost of \$24,000,000 were delivered in Districts I-IV. Thus the weighted average cost of crude oil delivered in District V is \$9 per barrel (\$36,000,000 divided by 4,000,000 barrels) and in Districts I-IV is \$8 per barrel (\$48,000,000 divided by 6,000,000 barrels).

Also during the month of October 1974, Firm A made mandatory sales under the buy-sell program of 400,000 barrels of crude oil to a refiner-buyer in District V and 600,000 barrels of crude oil to a refiner-buyer in District II. The remaining 9,000,000 barrels of crude oil purchased or landed by Firm A were refined by Firm A during October or placed in various refinery inventories for refining or to meet buy-sell obligations in future months.

Firm A also made numerous other purchases and sales during October of crude oil which was not to be refined by Firm A or to be used to meet buy-sell obligations. For example, it purchased 1,000,000 barrels of crude oil which it resold to Firms B and C. The sale to Firm B was entirely voluntary; the sale to Firm C was made pursuant to § 211.63(a), which requires the continuance of supplier-purchaser relationships in effect under contracts for sales, purchases and exchanges of domestic crude oil on December 1, 1973.

During the month of May 1973 Firm A purchased or landed for refining 9,000,000 barrels of crude oil at a total cost of \$27,000,000.

RULES AND REGULATIONS

Issue No. 1. What is the amount of increased cost of crude oil purchased or landed in October which Firm A has available to include in the computation of its base prices for its refined products in the month of November 1974, pursuant to § 212.83?

Issue No. 2. Would the amount of increased cost of crude oil purchased or landed in October to be included in the computation of its base prices for refined products pursuant to § 212.83 have been any different if the same

set of facts had arisen during the first buy-sell program in effect from February through May 1974?

Issue No. 1

Ruling. Firm A's base prices in November 1974 for refined products may include \$48,600,000 in increased cost of crude oil purchased or landed during October. The same result would be reached if the same set of facts had occurred during the first buy-sell program, except that the regulations at that time provided in § 212.88(d) for pass through on refined products of an additional 84 cents for each barrel of crude oil sold under the buy-sell program.

DOE price regulations provide two basic methods whereby refiners account for their cost of crude oil. The cost of crude oil purchased and refined is accounted for under Subpart E of Part 212, which permits the increased cost of crude oil purchased for refining to be passed through in the prices charged for the products refined from crude oil. The cost of crude oil purchased by a refiner and resold is accounted for under Subpart F of Part 212, which permits the increased cost of crude oil purchased for resale to be passed through in the prices charged for crude oil. In both instances increased cost of crude oil is measured against the cost of crude oil in May 1973, and the pass through of that increased cost of crude oil is achieved by permitting it to be applied to lawful selling prices for products that were in effect on May 15, 1973.

Under Subpart E, increased crude oil costs for products refined and sold by a refiner are defined in pertinent part in § 212.83(b) as "the difference between the total costs of crude petroleum during the month of measurement [i.e., the month preceding the current month for which prices are being determined] and the total cost of crude petroleum during the month of May 1973. . . ." The method of computing that difference is described in the refiner's cost formula contained in § 212.83(c), basically as follows:

$$A' = Q'(C'/Q') - (C'/Q')$$

where:

A'—The total increased cost of crude oil purchased or landed in the month of measurement and available for pass through in the subsequent month;

Q'—The total quantity or volume of crude oil purchased or landed in the month of measurement;

Q"—The total quantity or volume of crude oil purchased or landed in the month of May 1973;

C"—The total cost of crude oil purchased or landed in the month of May 1973; and

C'—The total cost of crude oil purchased or landed in the month of measurement.

Subpart F specifies the manner in which a refiner of crude oil is to determine its maximum lawful prices for sales of crude oil. With respect to resales (hereinafter "reseller sales") of crude oil generally, § 212.93(a) provides that the refiner can charge no more than its weighted average lawful selling price on May 15, 1973, to the same class of purchaser, plus an amount which reflects, on a dollar-for-dollar basis, its increased costs of crude oil. Such increased costs of crude oil are "the difference between the weighted average unit cost of [crude oil] in inventory and the weighted average unit cost of [crude oil] in inventory on May 15, 1973." (§ 212.92)

With respect to the special category of crude oil sales made by refiners under the buy-sell program (hereinafter "buy-sell sales"), however, a refiner-seller is required to charge a per barrel price equal to:

"in Districts I-IV the weighted average price of all crude oil delivered to a refiner-seller in that month for those Districts, and in District V, the weighted average price of all crude oil delivered to a refiner-seller in that month for that District. . . ."

subject to certain transportation and gravity adjustments, plus a "handling fee" (which is now 30 cents per barrel and formerly was 6 percent of the weighted average price (§ 212.94(b))).

It is an underlying principle of all of DOE pricing regulations that refiners, resellers, and retailers of crude oil and petroleum products be permitted to recover increases in their crude oil or product costs on a dollar-for-dollar basis in the prices permitted to be charged. Section 4(b)(2)(A) of the Emergency Petroleum Allocation Act

of 1973 generally provides that recovery of increased product costs be permitted on a dollar-for-dollar basis, and DOE (and the Cost of Living Council before it) has generally adopted the policy that recoveries should not exceed that dollar-for-dollar pass-through.

Thus, for example, except for provisions that deal specifically with increased non-product costs, both Subpart E and Subpart F provide for maximum lawful prices which have two component parts—the May 15, 1973, lawful selling price (which includes an amount which represents the cost of the product being sold on May 15, 1973, and an amount which represents the seller's margin on that sale) and the increased product cost attributable to the product since May 15, 1973. And both Subpart E and Subpart F include provisions for insuring that the revenues actually received in sales made under those subparts do not result in more than a dollar-for-dollar recoupment of the increased product costs, as measured pursuant to those subparts. Section 212.83(d) of Subpart E requires that if revenues are recouped which reflect more or less than "the entire amount of increased product costs," computed under Subpart E, appropriate adjustments must be made to base prices in the following month. Section 212.93(e) provides a similar requirement for Subpart F. Therefore, except in those instances which are clearly set forth in the regulations, it cannot be assumed that DOE's price rules are to be applied in such a manner as to obtain more than a dollar-for-dollar pass-through of increased product costs.

Such dollar-for-dollar passthrough is achieved in the foregoing hypothetical as follows:

Reseller Sales. With respect to the resales of crude oil which Firm A made to Firms B and C which were not required under the buy-sell program, the cost recoveries permitted under DOE regulations are tied directly to the weighted average unit cost of the crude oil inventories (as determined under § 212.92 by generally accepted inventory accounting procedures) from which the crude oil was resold. In other words, under the re-

seller rule of § 212.93, Firm A can pass through on such resales the cost of the barrels of crude oil resold plus its margin on resales of crude oil to the same classes of purchaser on May 15, 1973. Accordingly, since the cost of crude oil acquired for such resales is fully recovered on such resales themselves, such crude oil is outside the scope of Subpart E and should not be reflected in either the C' or the Q' factor of the refiner's cost formula for purposes of determining Firm A's allowable increased product cost recoveries on refined products under § 212.82(c). Moreover, it also should not be included in the amount of crude oil "delivered" to Firm A for purposes of determining its allowable cost recoveries on buy-sell sales under § 212.94(b).

Buy-Sell Sales. With respect to the mandatory sale of 400,000 barrels of crude oil in District V, Firm A is permitted by § 212.94(b) to recover its weighted average cost for all crude oil purchased or landed in District V (excluding crude oil purchased for resale under other than the buy-sell program). Since 4,000,000 barrels were delivered in District V at a total cost of \$36,000,000, the weighted average cost is \$9 per barrel, and Firm A's total allowable cost recovery on the 400,000 barrels sold under the buy-sell program in that District is \$3,600,000. The weighted average cost of crude oil delivered to Firm A in Districts I-IV is \$8 per barrel (\$48,000,000 total cost divided by 6,000,000 barrels), which, on the 600,000 barrels sold under the buy-sell program in District II, allows a cost recovery on those sales of \$4,800,000. Total cost recovery in both districts is \$8,400,000. In addition, Firm A was entitled to collect from refiner-buyers the 30 cents per barrel handling fee and a transportation adjustment, as provided in § 212.94(b), which amounts do not constitute crude oil "cost recovery," but rather are intended to compensate Firm A for the nonproduct costs of handling and transportation. (Any adjustments made in the buy-sell price for a gravity differential would constitute adjustments in the crude oil cost recovery of Firm A in its buy-sell sales).

Refined Product Sales. Firm A is required to make buy-sell sales at a price which, as specified by § 212.94, is equal to the weighted average cost of the crude oil delivered to Firm A for refining purposes and to meet buy-sell commitments. Therefore, unlike the case with reseller sales made under § 212.93, § 212.94 does not allow for the actual cost of that particular crude oil to be passed through on a dollar-for-dollar basis. For example, if the incremental barrels of crude oil sold under the buy-sell program cost Firm A \$12 per barrel, but could be resold at only \$8 per barrel, Firm A would not achieve on buy-sell sales alone a full recovery of the actual cost of on those incremental barrels.

The dollar-for-dollar pass through principle therefore can be achieved only if Firm A is permitted initially to include, for purposes of the refiner rules of Subpart E, the cost of crude oil purchased to meet buy-sell obligations with the cost of crude oil purchased for refining, and then, to the extent that crude oil sales are actually made under the buy-sell program, to subtract from this total cost figure the cost recovery permitted on such sales by § 212.94. Since, as noted above, the cost to a refiner-seller of the particular crude oil actually delivered to a refiner-buyer under the buy-sell program will almost invariably differ from the cost recovery permitted on such sales, this procedure insures that any difference between the cost incurred and the cost recovered by Firm A with respect to the particular crude oil transferred in such sales (whether positive or negative) will be added to or subtracted from increased costs of crude oil available for recovery in sales of refined products. The refiner-seller therefore does not suffer any loss or enjoy any gain because of its buy-sell sales.

The foregoing principles are realized by giving the various factors of the refiner's formula of § 212.83(c) the following values:

The value which Firm A must give to the Q' factor (quantity of crude oil purchased for refining during May 1973) is 9,000,000 barrels.

The value which Firm A must give to the C' factor (total cost of crude oil

purchased for refining during May 1973) is \$27,000,000.

The value which Firm A must give to the Q' factor is the total quantity of all crude oil purchased or landed in October 1974 for refining or to meet its obligations under the buy-sell program (i.e., excluding its crude oil purchased for reseller sales), less the total quantity of crude oil sold under the buy-sell program during that month:

	Barrels.
Total crude oil purchased.....	10,000,000
Less crude oil sold under buy-sell program.....	1,000,000
Q'.....	9,000,000

The value which Firm A must give to the C' factor is the total cost of all crude oil purchased or landed in October 1974 for refining or to meet its obligations under the buy-sell program (i.e., excluding the cost of crude oil purchased for reseller sales), less its total allowable cost recoveries on crude oil sold under the buy-sell program during that month:

Total cost of crude oil purchased during October 1974.....	\$84,000,000
Less allowable cost recoveries on buy-sell sales.....	8,400,000
C'.....	75,600,000

Therefore, the amount of increased cost of crude oil purchased or landed in October which Firm A has available in November to pass through to its customers of refined products is determined as follows:

$$\begin{aligned}
 A' &= Q'(C'/Q') - (C'/Q') \\
 &= 9,000,000 [(\$75,600,000 / 9,000,000) - (\$27,000,000 / 9,000,000)] \\
 &= 9,000,000 (\$8.40 - \$3.00) \\
 &= 9,000,000 (\$5.40) \\
 &= \$48,600,000
 \end{aligned}$$

That the application of the refiner's formula in this manner allows Firm A a full recovery of its cost of crude oil on a dollar-for-dollar basis can be seen by comparing the increased cost of crude oil recoverable on each category of Firm A's sales with Firm A's total increased cost of crude oil.

First, as noted above, the increased costs of crude oil other than that purchased for refining or for sale under

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the buy-sell program is excluded from consideration because, under the reseller rule, such costs are recoverable on a dollar-for-dollar basis in the prices which Firm A may charge for such resales. With this category excluded from consideration, Firm A's total crude oil costs for the month of October were \$84,000,000, and its increased crude oil costs over May 1973 cost levels were \$54,000,000 (\$84,000,000 less 10,000,000 barrels times a weighted average May 15, 1973 price of \$3 per barrel).

Firm A's increased crude oil costs recoverable on buy-sell sales were:

Total allowable cost recoveries on buy-sell sales.....	\$8,400,000
Less cost of same quantity of crude oil at May 1973 cost levels.....	3,000,000
Increased crude oil costs recoverable on buy-sell sales.....	5,400,000

The increased crude oil costs recoverable on refined products when the refiner's formula is applied as described herein are, as calculated above, \$48,600,000, which, when added to the \$5,400,000 of increased crude oil costs recoverable on buy-sell sales, means that Firm A is able to recover fully its \$54,000,000 of increased crude oil costs.

For the purposes of uniformity and consistency with respect to the completion of Form FEO-96, Part II, refiner-sellers should state on line 3 of Part II (total cost of crude petroleum purchased during the month of measurement), not the total of lines 1 and 2 as indicated on the Form FEO-96 itself, but the sum of lines 1 and 2 less the crude oil costs which the refiner-seller is allowed to recover on buy-sell sales. In other words, line 3 should have stated on it the value given to C' in the refiner's cost formula as determined in the manner specified above. Similarly, line 9 (total quantity of crude petroleum purchased during the month of measurement), rather than being the sum of lines 7 and 8 as indicated on the form, should be such sum less the quantity of crude oil sold under the buy-sell program during the month of measurement (i.e., the Q' factor).

If the same set of hypothetical facts had arisen during the first buy-sell program, which was in effect from February through May 1974, Firm A would have been able to pass through on its refined products an additional amount equal to 84 cents times the number of barrels resold under the buy-sell program. But, except for this 84-cent allowance provided for by former § 212.88(d), both the amount of increased crude oil costs which Firm A would have had available for pass through on refined products and the manner in which that amount was calculated would have been the same.

The question has been raised recently as to whether a different method of computing increased crude oil costs available for pass through on refined products was permitted during the first crude oil allocation program by former § 212.88(e), which was deleted as unnecessary effective June 1, 1974. That paragraph read as follows:

(e) *Reflection of costs.* Refiners required to sell crude oil under [the buy-sell program] shall be allowed to increase their product prices to reflect increased crude oil costs of all available crude oil prior to making crude oil sales to comply with [the buy-sell program].

DOE's refinery audit program has determined that some of the 38 refiner-sellers under the first buy-sell program read this provision as allowing the increased cost of crude oil required to be sold under the buy-sell program to be recovered twice—once when the crude oil was sold to a refiner-buyer and again by recovering it in the prices of the refiner-seller's refined products.

The proper interpretation of § 212.88(e) is simply that the cost of crude oil purchased or landed in the month to meet a refiner-seller's buy-sell commitments was to be included with the cost of crude oil purchased for refining, until a buy-sell sale was made, as described above. It was anticipated that many refiner-sellers would be required to meet their commitments under the buy-sell program by either taking the crude oil from inventories of crude oil they otherwise intended to refine or, preferably, by purchasing additional quantities of

crude oil on the world market. Since these incremental purchases would be at prices as high as \$15 per barrel and since the refiner-sellers were required to sell crude oil under the buy-sell program at a weighted average cost of all their crude oil (which for most refiners was about \$7-\$8 per barrel), FEO was concerned that refiner-sellers might think they were required to absorb a loss on the buy-sell sales of such incremental world market purchases. For example, the crude oil sold under the buy-sell program in District V by Firm A at \$9 per barrel in the hypothetical set of facts considered in this ruling could well have been a part of a shipment of crude oil landed by Firm A at a cost of \$14 per barrel.

Such a possible misconception by refiner-sellers is understandable in view of the fact that up to the time the buy-sell program was implemented, refiners properly excluded the costs of crude oil purchased for resale from the refiner's cost formula. The continuation of this practice with respect to crude oil resold under the buy-sell program would, of course, have created a substantial disincentive against the importation of crude oil to meet buy-sell commitments.

Thus, § 212.88(e) indicated that the portion of increased crude oil costs which a refiner-seller could not recover on buy-sell sales, because of the requirement that it make those sales at its weighted average cost, could be included in the C' factor of the refiner's cost formula for purposes of determining the proper weighted average cost of crude oil refined. Thus, under § 212.88(e), the increased costs of crude oil sold under the buy-sell program were to be "reflected" (but not included in their entirety) in the cost passthroughs on refined products.

It has been determined through refinery audits, however, that some refiner-sellers concluded that § 212.88(e) permitted the C' factor to include the cost of all crude oil purchased, without subtracting therefrom the costs attributable to crude oil which is not refined but which is required to be sold in buy-sell sales, and as also allowing the Q' factor of the refiner's formula to include the quantity of crude oil sold under the buy-sell program and not re-

fined. If such a reading had been given to the refiner's cost formula by Firm A in the foregoing hypothetical, the C' factor would have had a value of \$84,000,000 and the Q' factor would have had a value of 10,000,000 barrels. They would have yielded an amount available for pass through on refined products as follows:

$$\begin{aligned} A' &= 10,000,000 [(\$84,000,000 / \\ &\quad 10,000,000) - (\$27,000,000 / 9,000,000)] \\ &= 10,000,000 (\$8.40 - \$3.00) \\ &= 10,000,000 (\$5.40) \\ &= \$54,000,000 \end{aligned}$$

Thus, in applying the formula in this manner Firm A would have fully recovered all of its increased crude oil costs on the sale of refined products alone, and, in addition, would have recovered an additional \$5,400,000 of "increased costs" on buy-sell sales. This additional amount, as discussed above, is not a permissible crude oil cost recovery, for such an interpretation of § 212.88(e) would have been contrary to the well established policy of the Cost of Living Council and DOE pricing regulations that, except in certain instances clearly designated in the regulations, prices of petroleum products may reflect increased crude oil costs only on a dollar-for-dollar passthrough basis.

Refiner-sellers are hereby advised that amended Form FEO-96's should be filed if previous filings are inconsistent with this ruling. DOE has also determined that it would be inequitable to allow a minority of refiner-sellers which may have recouped amounts in excess of their increased product costs as a result of a misinterpretation of § 212.88(e) or of the refiner's cost formula to retain the proceeds of such overrecoupment. Therefore, those refiner-sellers which not only misapplied the refiner's formula but which DOE determines have also passed through to the marketplace amounts in excess of their increased product costs as a result of such a misapplication of the rules will be required, in a manner to be specified by DOE, to return such overrecoveries to the marketplace.

[39 FR 39422, Nov. 6, 1974]

RULING 1974-27—ALLOCATION OF REFINER'S INCREASED PRODUCT COSTS TO SALES VOLUMES

Facts. Firm A, a refiner subject to the Department of Energy (DOE) Mandatory Petroleum Price Regulations, sells most of its covered products to domestic purchasers in arm's-length sales. Some of the covered products refined by Firm A, however, are consumed by A as refinery fuel, as other plant operating fuels, or as delivery vehicle fuel, some are transferred to Firm A's affiliated entities for further processing and ultimate sale as petrochemicals or other products not subject to DOE price regulations, and some are sold for export to points outside the United States.

Issue. How should Firm A allocate increased product costs under 10 CFR 212.83(c) with respect to these transactions?

Ruling. Firm A must include in its volume of covered products to which it allocates increased product costs pursuant to § 212.83 the total volume of the covered products which it (a) sells in arm's-length transactions; (b) refines and consumes internally; (c) transfers to affiliated entities for further processing and ultimate sale as other than covered products; and (d) sells for export.

All of the foregoing transactions constitute transfers for value which must be treated as part of Firm A's sales volume of covered products for purposes of allocating increased product costs pursuant to § 212.83(c), and for purposes of calculating increased product cost recoupment pursuant to § 212.83(e), so that the dollar-for-dollar passthrough provisions of the price regulations are effectively carried out.

If Firm A were to exclude from its sales measurement the internal product consumption, transfers to affiliates, and export sales, in the fact situation posed above, it would apply its increased product costs only to its arm's-length sales of these products. Such discriminatory application of increased costs only to arm's-length purchasers would violate the equal application of increased product cost provisions of § 212.83(c), and would be inconsistent with the purposes of the Emergency Petroleum Allocation Act

of 1973, Pub. L. 93-159, since the dollar-for-dollar passthrough of increased product costs provided for by the Act would not be realized on an equitable basis if Firm A and its affiliates were to be permitted to avoid the impact of the passthrough provisions.

The uses to which Firm A may put the fuels it produces constitute clear economic value to it. Examples of these uses include, but are not limited to, use as refinery fuels and use as operating fuels (such as diesel fuel to power generator engines or gasoline to operate delivery vehicles). All volumes of covered products produced by Firm A and used by Firm A must therefore have the same increment of increased product cost assigned to them as is assigned to each product by Firm A in determining its selling price for that product in arm's-length transactions, with that increment of increased product cost to be regarded as recouped by Firm A when it uses the product, and therefore no longer available for passthrough in prices charged by Firm A in arm's-length transactions. Of course, to the extent that this means of accounting for internal use of fuel by Firm A serves to increase Firm A's non-product costs, such increased costs may be passed through by Firm A, to the extent permitted pursuant to the regulations governing increased non-product cost passthrough. (The cost of crude oil and of purchased covered products which are used as refinery fuel or otherwise consumed by Firm A are excluded from Firm A's initial calculation of increased product costs, pursuant to § 212.83, as amended effective December 1, 1974.)

Similarly, transfers of covered products by Firm A to affiliated entities, for further processing and ultimate sale as products other than covered products, which are exempt from price regulation, must be treated as sales by Firm A. These volumes must bear the same increment of increased product costs as is applied to prices charged those classes of purchaser which purchase the same product at arm's-length. Just as the DOE permits "transactions between affiliated entities" to be used as a basis for determining costs (e.g., § 212.83(b), and § 212.83(f)), DOE requires that the

economic significance of transactions between affiliated entities be taken into account when determining recovery of increased costs in sales of covered products. "Increased product costs" are not to be attributed in every instance of an internal transfer or transfer to an affiliate of covered products, but must be provided for in each instance where there will be no ultimate sale in an arm's-length transaction of that covered product, or of equal volumes of other covered products derived from that covered product.

The rationale for this requirement is apparent, since it would obviously be unfair to permit Firm A to pass through its increased product costs only in arm's-length sales and not in transfers to its affiliates, particularly since its affiliates could well be competitors of its arm's-length purchasers in an unregulated sector of industry, such as the petrochemical sector.

The volumes of product sold in export sales by Firm A, which are exempt from the price limitations of the DOE pursuant to § 212.53, are nevertheless regarded as sales of covered products under Part 212 for purposes of determining cost recovery. Thus, although the DOE does not regulate the "prices charged for export sales of covered products," the revenues received in such sales must be regarded as resulting in the recoupment by Firm A of increased product costs, to the extent that the selling prices in such sales are higher than the weighted average prices at which the same products were sold to the same classes of purchaser on May 15, 1973.

The reason for this means of accounting for export sales is self-evident, since any failure to take into account sales revenues from such sales as recoupment of increased product costs would result in double recoupment of costs—once in the export sale and again in domestic sales. This requirement that recovery of increased product costs in export sales also be taken into account is also apparent by virtue of the fact that any other approach would provide a strong incentive for export of badly needed petroleum products, at the expense of domestic consumers.

It should also be noted that the "V" factor in the cost formulae of § 212.83 encompasses as sales volumes not only the volumes of petroleum products (covered products and products refined from crude petroleum other than covered products) which are disposed of by the refiner in arm's-length transactions, but also the volumes of these products which are accounted for in transactions of the types described above. In general, the "V" factor appearing in § 212.83(c) serves to establish a proportion of increased product costs which may be allocated to covered products.

The "total volume" of product, including volumes which are disposed of by internal consumption on affiliated entity transactions of a refiner or by export sales, must therefore be used when allocating increased product costs under the "V" factor of the § 212.83 formulae, so that no distortion in that cost allocation will result from the exclusion of such transactions.

This ruling defines the manner in which the foregoing transactions are to have been accounted for under the price regulations since their inception, except with respect to refinery fuel. The DOE is aware that there was a basis upon which refiners could have concluded that the increased cost of refinery fuel derived from crude oil was permitted to be treated as an increased product cost prior to December 1, 1974. An amendment to the cost allocation formulae of § 212.83, effective December 1, 1974, now explicitly requires that the cost of crude oil and of purchased covered products which are used as refinery fuel be excluded from the increased product cost pass through provisions of the regulations. With respect, therefore, only to covered products consumed as refinery fuel, this ruling is interpretive of the regulations as amended December 1, 1974. In all other respects, it is interpretive of the price regulations since they were first promulgated.

[39 FR 44415, Dec. 24, 1974]

RULING 1974-28—INAPPLICABILITY OF THE "STRIPPER WELL LEASE" EXEMPTION TO GAS WELLS

Facts. Firm P produces crude petroleum and petroleum condensates, including natural gas liquids from Property A (as defined in 10 CFR 210.32). From Property B, Firm P produces natural gas and condensates, including natural gas liquids. State X, where both properties are located, has classified the production of Property A as production of an oil well from an oil reservoir, and the production of Property B as production of a gas well from a gas reservoir. Firm P, during the preceding calendar year, produced less than ten barrels per well per day of crude petroleum and petroleum condensates, including natural gas liquids, from Property A, and less than ten barrels per well per day of petroleum condensates, including natural gas liquids, were extracted from the natural gas produced from Property B.

Issue. May Firm P apply the "stripper well lease" exemption of 10 CFR 210.32 to Property A and Property B?

Ruling. Firm P may apply this exemption to Property A, which qualifies as a "stripper well lease" under § 210.32. Firm P may not apply the "stripper well lease" exemption to the production of natural gas liquids obtained from Property B since that property does not qualify as a "stripper well lease" under § 210.32.

A stripper well lease is defined in § 210.32(b) as "a 'property' whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar year."

The provisions of 10 CFR 210.32 specifically apply, therefore, only to a property which has a "production of crude petroleum and petroleum condensates, including natural gas liquids." Firm P may, therefore, apply the provisions of the stripper well lease exemption to the production of the property where "oil wells" are producing (whether or not there is production of associated gas or of casinghead gas), but may not properly claim the exemption for the natural gas liquid production of "gas wells" on a property, since these wells do not produce crude petroleum.

This interpretation of a stripper well lease comports with industry usage and the congressional intent in providing for a stripper well lease exemption in the Emergency Petroleum Allocation Act of 1973. The phrase "stripper well" has long been understood in the petroleum industry to refer only to a well which produces oil, or oil with associated gas. The "stripper well" concept, commonly measured at ten barrels per day, has never extended to gas wells, whose production of liquids is always marginal by definition.

The purpose of the Congress, in extending exempt status for the first sale of "stripper well" production in the Emergency Petroleum Allocation Act of 1973 (Pub. L. 93-159), (EPAA) was to assure economic viability and continued production of crude oil from marginal oil wells. The legislative history of this exemption reveals that Congress understood the "stripper well" concept in the same way that the oil industry applies the phrase, namely with reference to oil wells with such low production levels of crude oil that the producer received only a marginal return over cost of production.

Neither the Congress nor the DOE regulations intended to extend the "stripper well" language to encompass any production of "crude petroleum and petroleum condensates, including natural gas liquids" of wells which do not produce crude petroleum, for which the phrase "stripper well" has no real significance. The profitability of production of natural gas from a gas well depends principally on the volumes of gas produced and the price for which it is sold. The amounts of liquids associated with that gas, whether or not they are separated from the gas, would not, therefore, be the only appropriate factor to take into account in determining whether a price incentive was necessary to insure the continuation of gas production from a gas well.

The fact that gas well liquid production is not to be regarded as in an exempt status pursuant to § 210.32 is further shown by the anomalous results such an exemption would yield in connection with the processing of liquids from natural gas. If the stripper well lease provisions of § 210.32 were

applicable to Firm P's gas property, Firm P would have an incentive to keep the volume of liquids ultimately recovered from the gas below ten barrels per day per gas well. The processing and recovery of liquids (predominately propane, butanes and natural gasoline) from gas production is an important source of the supply of these liquids, and ought not be discouraged by the producer's desire to sell fewer barrels of liquids in order to obtain an exempt "first sale" of those liquids. This result was never intended by the stripper well lease exemption. Further, it would be clearly unreasonable if the stripper well lease exemption were to be regarded as depending upon the existence, location, or efficiency of individual extracting or processing plants.

Thus, the first sale exemption of § 210.32 applies only to the production of oil wells, which produce crude petroleum and petroleum condensates, including natural gas liquids, and does not apply to gas wells which produce condensates, including natural gas liquids, since neither the purpose nor the language of the "stripper well lease" exemption can be regarded as extending to such production.

[39 FR 44414, Dec. 24, 1974]

RULING 1974-29—PRODUCTION WELLS FOR PURPOSES OF THE "STRIPPER WELL LEASE" EXEMPTION

Facts. Firm P, a producer of petroleum, produced during the preceding calendar year 150,000 barrels of crude petroleum and petroleum condensates, including natural gas liquids from 40 production wells located on Property A, as defined in 10 CFR 210.32. In addition, there were five injection wells in operation on that property last year. An injection well is one which is used to inject water, air, gas, steam or other materials into the ground to assist in the recovery of crude petroleum through producing wells. Wells which formerly produced crude petroleum may be used for injection purposes, or new wells may be drilled solely for the purpose of injecting materials into oil-bearing formations and reservoirs.

The average daily production per well from Property A was 10.27 barrels, based on the 40 production wells,

whereas the average daily production per well would be 9.13 barrels if 45 wells, including the 5 injection wells, were used to calculate the average daily production figure.

Issue. Is an "injection" well a "well" for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?

Ruling. No. Under the DOE regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. "Average daily production" is further defined in 10 CFR 210.32(b) as:

The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produce crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the DOE regulations by their specific language provide that only wells "which produce crude petroleum" are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to "produce" crude petroleum, they are not wells which themselves "produce" crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the non-producing well was an "injection" well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

[39 FR 44414, Dec. 24, 1974]

RULING 1974-30—MEASUREMENT OF THE NUMBER OF BARRELS OF PRODUCTION FROM AN OIL WELL FOR THE "STRIPPER WELL LEASE" EXEMPTION OF 10 CFR 210.32

Facts. Firm P, a producer, produces crude petroleum, and petroleum condensates, including natural gas liquids, and casinghead gas from oil wells operated on a property, as defined in 10 CFR 210.32. Firm P transmits, to nearby storage and gathering facilities, the condensates and natural gas liquids obtained at the wellhead, along with the crude petroleum. These liquids are then eventually transmitted through a pipeline, and are all treated as crude petroleum. Firm P subsequently receives "run tickets" as evidence of the volumes of these liquids which were disposed of in this way. The casinghead gas, a natural gas which is "wet," or rich in natural gas liquids in their gaseous phase, is separately transmitted to a processor at a nearby natural gas processing plant, where the natural gas liquids (propane, butanes, and natural gasoline) are extracted from the gas.

The processor pursuant to prior contractual agreements with Firm P, determines an amount of liquids, which it has extracted and sold, that is attributable to the gas transmitted to it by Firm P, and notifies Firm P of the volumes to which it is entitled under the processing agreement.

Issue. What volumes of liquid hydrocarbons are included in the measurement of production by Firm P, for purposes of the "stripper well lease" exemption of 10 CFR 210.32?

Ruling. For purposes of measuring the volumes of liquids produced by Firm P under § 210.32 of DOE regulations, Firm P should include only those volumes of unseparated liquids which were transmitted and sold as part of the "crude petroleum" liquid stream. It may exclude all those volumes of separated natural gas liquids, which were ultimately extracted from its casinghead gas, but were not sold as crude petroleum and petroleum condensates.

Thus, Firm P's average daily production of crude petroleum and petroleum condensates, including natural gas liquids, would not include any products produced in the processing plant (so-

called "plant products") whether or not the plant keeps the accounts of these product volumes for Firm P.

The purpose of the stripper well lease exemption was to provide needed incentives to increase available supplies of crude petroleum by avoiding the shutdown of the traditional "stripper well" because of high costs of production in relation to the relatively small volumes of crude oil produced from such wells. The increase in crude oil supplies, which the exemption is intended to promote, does not, however, have any necessary relationship to whether or to what extent any "wet" gas obtained by an oil producer is processed to obtain separated natural gas liquids. Firm P therefore should determine its production for purposes of the stripper well lease exemption based upon the liquid hydrocarbons which it produces and sells as crude oil, without regard to the fact that its production also yields a "wet" gas, from which certain volumes of separated natural gas liquids can be extracted.

Although the stripper well concept is applicable only to the production of an oil well (See DOE Ruling 1974-28), the DOE nevertheless included the phrase "natural gas liquids" when it defined the production to be taken into account for purposes of the exemption provisions of § 210.32 as "crude petroleum and petroleum condensates, including natural gas liquids." The term "natural gas liquids" was included solely in the context of the "petroleum condensates," which often are produced at a well and which flow with the crude petroleum to storage, gathering and pipeline facilities. "Natural gas liquids" are among the petroleum condensates which may be separated at a well from the associated gas produced by an oil well (often by a simple series of baffles), and in order to include all of the liquid production of the well that is moved as crude petroleum, "natural gas liquids" are included as "petroleum condensates" whenever they are commingled with crude petroleum. Natural gas liquids are not included therefore, when they are transmitted separately from the crude petroleum, in gaseous state or liquid state, to a processing plant for

separation into the component products.

The stripper well lease exemption was not intended by DOE to be applied to, or withheld from, particular properties simply because one may produce a substantial amount of "wet" gas, which yields large volumes of natural gas liquids, and another may not. Nor would the intent of the exemption be served were its applicability to depend upon whether a particular producer's processing contract calls for the attribution of the resulting liquid volumes back to the lease. The effects of applying "stripper well" concepts to processed volumes of liquids would be as varied as the many different arrangements between producers and processors, and would further depend on the existence or efficiency of particular gas plants.

Accordingly, Firm P's production for purposes of § 210.32 includes all liquid hydrocarbons which are treated as crude petroleum. Typically, Firm P may maintain records of the volumes of these liquids which are sent to a pipeline by means of "run tickets" or other similar evidence of sales volume. These will reflect the volumes of all liquids treated as "crude petroleum," including petroleum condensates and unseparated, mixed natural gas liquids, but will not include other natural gas liquids which are ultimately separated from the "wet" gas, and separately accounted for.

[39 FR 44416, Dec. 24, 1974]

RULING 1975-1—TRANSPORTATION COSTS

Facts. Firm X, a reseller of a covered product, purchases the covered product from Refiner W. Carrier A, an independent carrier, transports the covered product from Refiner W to Firm X. Carrier A increases the rates it charges Firm X for transporting the covered product. Firm X sells the covered product to Firm Z, a retailer, and delivers the covered product in its own trucks to Firm Z. Firm X's costs incurred in connection with delivering the covered product to Firm Z increase.

Issue No. 1. May Firm X treat Carrier A's increased transportation charges to it as "increased costs," as defined in § 212.92?

Issue No. 2. May Firm X treat its increased costs incurred in connection with delivering the covered product to Firm Z as "increased costs," as defined in § 212.92?

Ruling. Firm X may treat Carrier A's increased transportation charges as "increased cost" pursuant to § 212.92, but may not treat its increased costs incurred in connection with delivering the covered product to Firm Z as "increased costs."

"Increased costs" are defined in § 212.92 to mean "the difference between the weighted average unit cost of a product in inventory and the weighted average unit cost of that product in inventory on May 15, 1973." "Increased costs" are thus defined to be increased "cost of a product," and such increased costs are permitted to be passed through, on a dollar-for-dollar basis, in the prices charged for the product by resellers, reseller-retailers, and retailers pursuant to § 212.93. Increased non-product costs, on the other hand, are permitted to be reflected in the prices charged by resellers, reseller-retailers, and retailers only to the extent permitted by § 212.93(b).

The "weighted average unit cost of a product in inventory" includes transportation costs incurred in bringing the covered product into the seller's inventory. The cost of product is, in other words, considered to be the "delivered cost" to the buyer. In many instances, the product is purchased at a "delivered price," and there is no separate transportation cost incurred. Where transportation costs are incurred separately in connection with acquiring product, however, they have historically been treated as a cost of acquiring the product. For example, refiners are expressly allowed to treat increased transportation costs associated with obtaining crude oil or covered products as increased product costs, pursuant to the definitions of "cost of crude petroleum" and "cost of petroleum product" in § 212.83(b). "Cost of petroleum product" is defined in § 212.83(b), for example, to mean:

(1) For purposes of domestic petroleum products other than crude petroleum the

purchase price including transportation costs.

(2) For purposes of imported petroleum products other than crude petroleum, the landed costs.

The definition of "landed costs" in § 212.93(b) also includes transportation costs. Thus, pursuant to § 212.83(b), refiners have been expressly permitted to treat increased transportation costs incurred in connection with acquiring crude oil and petroleum products as increased product costs.

Although transportation costs are not specifically dealt with under the § 212.92 definition of "increased costs" which is applicable to resellers, reseller-retailers, and retailers, Form CLC-92, Part III, line 12, which was published by the Cost of Living Council and which certain retailers, retailer-resellers, and resellers must file with respect to No. 2 heating oil prices, states that "The total of all charges associated with transporting the No. 2 heating oil to your inventory, historically considered to be part of the costs and not already included in unit costs, should be reflected in [the cost of product]" (Form CLC-92, Instructions for Part III, line 12). Thus, resellers and retailers have been given further reason to believe that increased transportation costs incurred in obtaining covered products may properly be treated as increased product costs. The purpose of this ruling, therefore, is to confirm that such transportation costs are properly included within the meaning of "increased costs," as defined in § 212.92.

Firm X is not, however, permitted to treat increased transportation costs associated with delivering the covered product to its customers as "increased costs" under § 212.92. Such costs are not related to the cost of the product to Firm X, but are, rather, a cost of doing business for Firm X, which must be treated as all other non-product costs, and which may be reflected in Firm X's selling prices only to the extent permitted by § 212.93(b). Again, such treatment is consistent with the express provisions of the refiner price rules, which treat all marketing costs as non-product costs (§ 212.87). Similarly, Form CLC-92 does not provide

any basis upon which a reseller, reseller-retailer, or retailer could seek to pass through as an increased product cost any increased transportation costs associated with delivering No. 2 heating oil to its customers.

It should be noted that in computing the "weighted average unit cost" of a product in inventory pursuant to § 212.92, a firm must be consistent in its accounting procedures. Thus, a firm which includes transportation costs associated with acquiring a covered product as a product cost when calculating its current weighted average unit cost of product in inventory must also include such costs in its calculation of the weighted average unit cost of that product in inventory on May 15, 1973.

[40 FR 6768, Feb. 14, 1975]

RULING 1975-2—CLASS OF PURCHASER; APPLICATION OF TERM UNDER PETROLEUM PRICE REGULATIONS

In Rulings 1974-17 and 1974-18 (39 FR 21042, June 18, 1974), the Department of Energy set forth guidelines with respect to the meaning of the terms "class of purchaser" and "customary price differential" as defined in 10 CFR 212.31 and used in DOE's pricing regulations, 10 CFR, Chapter II, Part 212. While those rulings helped to clarify the application of the "class of purchaser" concept, it has subsequently come to DOE's attention that those rulings did not resolve all outstanding questions and that to some extent the rulings themselves have been misconstrued. This ruling is intended, therefore, to clarify further the application of the class of purchaser concept by supplementing Rulings 1974-17 and 1974-18. To the extent that there is any inconsistency between this ruling and those earlier rulings, this ruling will be controlling. Because of the complexity of this issue, this ruling will first discuss the general principles involved, and then illustrate some of those principles with factual examples.

DISCUSSION

A. Background. DOE price regulations provide generally that sellers may charge prices for covered prod-

ucts that reflect their May 15, 1973 lawful selling prices and a dollar-for-dollar passthrough of the amount by which their product costs have increased since that time. Thus, each selling price determined under DOE price regulations has at least two components: that portion which represents a May 15, 1973 lawful selling price and that portion which represents a pass-through of increased product costs. In addition, a further increment to some selling prices is permitted, subject to certain conditions, to reflect increased non-product costs.

The portion of the selling price that represents a May 15, 1973 selling price is, with respect to each product sold to each buyer " * * * the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973. * * * " (§ 212.82(b); § 212.93(a)).

In making the computation of this "weighted average price * * * in transactions with the class of purchaser concerned on May 15, 1973," a firm " * * * may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973." (§ 212.82(b); § 212.93(b)).

Since increased product costs are generally required to be applied equally among classes of purchasers of a particular covered product, differences in weighted average, May 15, 1973, selling prices among classes of purchaser are generally reflected in like differences in current lawful selling prices for that product among those classes of purchaser, and a principal function of the class of purchaser concept is to preserve the price distinctions among purchasers that customarily existed under free market conditions. To achieve the objective of making covered products available at equitable prices, DOE regulations require sellers to group together customers that are similarly situated and to compute a weighted average of their May 15, 1973 selling prices in sales to those customers. Sellers are thus required to maintain a single lawful price for a product to all customers that fall into a particular class, rather than having to establish individual

maximum lawful prices to individual customers.

As noted above, sellers must compute for each product a single weighted average May 15, 1973 price for each class of purchaser of that product. From the standpoint of the seller, the number of different classes of purchaser for which it computes separate weighted average May 15, 1973 prices will in most cases have no direct bearing on the amount of cost recovery or profits realized. The principal function of the doctrine is to maintain the price differentials that existed on May 15, 1973 between groups of purchasers which were not similarly situated then and are not now similarly situated.

That the maintenance or elimination of separate classes of purchaser will ordinarily have no bearing on the cost recovery or profits of the seller can be shown in a simplified example, as follows: A firm sold gasoline on May 15, 1973, with 50 percent of its sales at retail, at a weighted average retail price of 25 cents per gallon, and 50 percent of its sales at wholesale, at a weighted average wholesale price of 17 cents per gallon. That firm, if it were to disregard the distinctions between its classes of wholesale and retail purchasers entirely, would calculate a single weighted average May 15, 1973 selling price of 21 cents per gallon for all of its gasoline sales, as to which it would then apply its increased product costs. In such a case, the firm would not recoup any greater amount of increased product costs or realize any greater profits than if it had treated its retail and wholesale customers as separate classes of purchaser, with separate weighted average May 15, 1973 selling prices, assuming that its ratio between wholesale and retail sales remained at 50-50. Only if the ratio between its total wholesale and retail sales changed would the firm's revenues (and, potentially, its profits) be affected by whether or not separate classes of purchaser had been established for wholesale and retail sales.

The significance of the application of the class of purchaser concept is, therefore, principally to be found in its impact on the relative prices among buyers from a particular seller, rather than in any impact on the increased

product cost recovery or profits of a seller.

B. Guidelines for determining class of purchaser. This ruling is intended to provide further guidance to sellers in making price distinctions between different purchasers, by reviewing some of the pertinent factors which must be considered in making class of purchaser determinations. This ruling also is to provide guidance concerning certain specific kinds of circumstances which involve Robinson-Patman Act considerations, and which are known to be the source of particular difficulty with respect to this issue.

The basic guidelines for class of purchaser determinations are set forth in § 212.31, where the term "class of purchaser" is defined as:

Purchasers or lessees to whom a person has charged a comparable price for a comparable property or service pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

The term "customary price differential" is defined in the same section as including:

A price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

Both of these definitions were carried over virtually verbatim from the Economic Stabilization Regulations; 6 CFR 150.31, 38 FR 21592 (1973) (and 6 CFR 150.352, 38 FR 22536) which were applicable generally to all sellers of goods and services, including petroleum products.

In order to clarify the application of these definitions, DOE issued, on June 12, 1974, Rulings 1974-17 and 1974-18. Ruling 1974-17 stated that it was unlawful currently to charge different prices to individual purchasers paid different prices of the same class, even though those individual purchasers paid different prices on May 15, 1973. In that ruling, DOE made it clear that:

A class of purchaser is . . . the smallest unit for which a uniform selling price may be computed because, by definition, no customary price differentials exist within a class of purchaser. It should be noted, however, that a class of purchaser may consist

of only a single customer, if that particular customer alone was charged a comparable price for a comparable property or service pursuant to a customary price differential between the customer and all other customers.

Thus, Ruling 1974-17 dealt only with a single class of purchaser, and described the proper means of determining a single weighted average May 15, 1973 price to that class of purchaser.

Ruling 1974-18 dealt principally with the issue of whether certain discounts constitute a "customary price differential" for purposes of determining whether separate classes of purchaser exist. In that ruling, DOE stated that a discount off the published dealer tankwagon price for gasoline given on January 1, 1973 to "Company A," on a "high volume retail outlet in a favorable location," as a "competitive inducement" of indefinite duration for it to continue to purchase gasoline from the supplier, and in effect on May 15, 1973, was "customary," but that a discount in effect on May 15, 1973, given to Company B on April 15, 1973 as "a form of subsidy" to be effective only so long as a "price war" situation lasted, was not "customary." Thus, Ruling 1974-18 stated that, with respect to the described types of discounts, DOE would look to whether the parties intended the discount to be temporary or customary. In order to assist in making that determination, Ruling 1974-18 created the following presumption:

[DOE] will generally regard any discount that was in effect on May 15, 1973, and that had either been in effect or had been granted for a period of six months or more, to be a customary discount. This presumption may be rebutted in particular situations by appropriate factual showing.

Ruling 1974-18 also made it clear that even though the supplier was not required to maintain a separate class of purchaser with respect to its temporary discount sales, it nevertheless had to take that lower price into account in computing its May 15, 1973 weighted average lawful selling price with respect to all customers in the class of purchaser concerned. As noted above, §§ 212.82(b) and 212.93(d) require that in determining that weighted average

May 15, 1973 price, all temporary special sales, deals or allowances have to be taken into account. Thus, Rulings 1974-17 and 1974-18 serve to make clear that, as to any particular class of purchaser, only a single price can be charged and that, for purposes of distinguishing between "customary" price differentials and "temporary" price differentials, there would be a presumption that discounts that had been in effect for at least six months on May 15, 1973, or which were in effect on May 15, 1973 and had been granted for a period of at least six months, represented customary price differentials.

The existence of a discount on May 15, 1973, is, however, only one of several key elements which must be considered with respect to making class of purchaser determinations. The purpose of this ruling is to set out more explicitly the other key elements that must be taken into account in determining the existence of separate and distinct classes of purchaser.

The determination of what constitutes a "comparable price" charged pursuant to a "customary price differential" should begin with the § 212.31 definition of "customary price differential," which, as indicated above, lists illustrative factors to be taken into account, to include:

A price distinction based on a discount allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

The principal significance of the first portion of this definition, which refers to "a discount, allowance, add-on, premium, and an extra," is to indicate that a "price distinction" may exist not only because of different selling prices for a product, but may, in fact, exist even though selling prices are equal. Thus, although two purchasers may have purchased the same product at the same price on May 15, 1973, one price may have reflected a particular type of "allowance," whereas the other price may not have, so that the two purchasers could not appropriately be placed in the same class of purchaser.

The second portion of the definition, which adverts to the illustrative fac-

tors which may account for price distinctions, however they are expressed, is of particular significance in determining the classes of purchaser of each seller. For purposes of this ruling, the important factors aside from grade or quality, which do not require extended discussion herein, are differences in:

- (1) Location;
- (2) Type of purchaser;
- (3) Volume; and
- (4) Term or condition of sale or delivery.

These factors, in the order listed above, provide a logical sequence for making class of purchaser determinations.

Although price differentials may reflect differences in location both of the seller's outlet or distribution point and of the buyer's place of business, location should be considered first as it relates to the seller. To the extent that a seller has multiple locations from which it distributes products, it should make its class of purchaser determinations on a location-by-location basis. Only to the extent that it can ultimately be determined that no customary price differentials were reflected between a seller's prices at two or more locations would it be possible for a seller to treat sales from such locations as being to the same class of purchaser.

In evaluating its sales from a particular location, a seller should next look to the types of customers it had, on May 15, 1973, for purposes of making price determinations. There are certain readily apparent distinctions to be made in this regard, such as those relating to recognized levels of distribution (e.g., wholesale, retail, end-user, etc.), those relating to methods of sale (e.g., branded, non-branded), and those relating to types of use (e.g., re-sale, industrial, commercial, residential, etc.). It should be noted in this regard that although certain industry-wide practices have existed in regard to certain "customer types," as to which customary price differentials existed, other practices as to price distinctions based on customer types may have varied from seller to seller, depending on circumstances.

Having determined those types of customers which were treated differently from other types of customers for pricing purposes on May 15, 1973, a firm must next determine, as to each such type of customer, the extent to which prices of product were differentiated according to volumes purchased (e.g., sales in cargo lots, barge sales, pipeline sales, tankwagon sales, sales made pursuant to a sliding volumetric discount scale, etc.).

Finally, a firm must determine, as to sales to each group of purchasers identified under the foregoing criteria (those purchasers which bought at a price reflecting the seller's location, the type of purchaser involved, and the volume of product involved), the extent to which customary price differentials reflected differences in terms or conditions of sale or delivery on May 15, 1973. Such differences in terms or conditions may, of course, simply reflect purchaser delineations already made under other criteria, such as, for example, those respecting sales to branded and to non-branded dealers. Differing terms or conditions of sale or delivery may, however, also serve to delineate still further classes of purchaser which are not distinguishable under the other criteria.

A firm may, for example, make its product available to some customers on a delivered basis and to others at its terminal. Such a difference in the terms of sale to otherwise indistinguishable purchasers would serve as the basis for a customary price differential between groups of purchasers, and thereby establish separate classes of purchaser.

It is in this area of differing terms and conditions of sale, and particularly where such terms and conditions, including price terms, were established by written contract on May 15, 1973, that class of purchaser determinations become most difficult.

In some instances, the fact that sales were made pursuant to contractual terms and conditions may serve to distinguish those purchasers from purchasers that did not buy under contract, and in others it may not. For example, if a seller sold a product to both contract and non-contract purchasers on identical terms and condi-

tions, there would be no basis for establishing separate classes of purchaser. If, however, a firm's contract purchasers were generally those purchasers that bought all of their requirements from the firm over a given time period, whereas the firm's non-contract purchasers bought from the firm only on an occasional and unpredictable basis, and if this difference in methods of purchaser were reflected in a customary price differential, it would not be proper for the selling firm to place its contract and non-contract purchasers in the same class.

In cases where all of the foregoing analysis has been made, and a firm's purchasers have been grouped into appropriate categories, there may nevertheless exist differences in prices charged to purchasers within those groups. Such differences might simply reflect the varying competitive situations at the various times when contractual prices were agreed to, or they may, upon closer examination, represent customary price differentials that have resulted from factors which may not even have been consciously adverted to at the time, but which nevertheless can be objectively verified.

It is in this area, where purchasers are ostensibly similarly situated, that price distinctions become potentially at odds with the policies intended to be furthered by the Robinson-Patman Act.

Pricing structures in the petroleum industry, and particularly discount practices, reflect the requirements of the Robinson-Patman Act amendments to the Clayton Act, 15 U.S.C. 13, and the numerous Federal Trade Commission and Federal court decisions which have applied that Act to the petroleum industry. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides in pertinent part:

It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of

such discrimination, or with customers of either of them * * * 15 U.S.C. 13(a).

Thus, a seller is prohibited from discriminating in price between two of its customers if the effect of such discrimination may be substantially to lessen competition or to injure, destroy or prevent competition with any person who either (i) grants the discrimination (so-called primary line injury); (ii) knowingly receives the benefit of the discrimination (secondary line injury); or (iii) is a customer of the person receiving the benefit of the discrimination (tertiary line injury).

The Robinson-Patman Act recognizes two principal types of exceptions to the general policy against discrimination between two customers. The first, commonly referred to as the "cost justification" defense, is:

That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * * Id.

A second, and much narrower, exception, referred to as the "meeting competition" defense, provides:

Upon proof being made * * * that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, * * * *Provided, however,* that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. Clayton Act, section 2(b), 15 U.S.C. 13(b).

Thus, despite common use of the term "competitive discount" to include discounts such as volume discounts, a true "competitive" or "meeting competition" discount within the meaning of the Robinson-Patman Act is only (a) one which is extended in good faith to meet an actual lower offer made to the purchaser by the supplier's competitor in an individual competitive situation, *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 748, 753 (1945); cf. *Callaway*

Mills Co. v. FTC, 362 F. 2d 435 (5th Cir. 1966), or (b) one by which the supplier subsidizes a dealer in order that the dealer can compete effectively in a local price war situation, provided that the dealer's competitors are also being subsidized by their suppliers. See *FTC v. Sun Oil Co.*, 371 U.S. 505, 512 n. 7 (1963). Since the burden of proving the competitive discount justification under section 2(b) is on the defendant, may sellers, including many oil companies, have historically provided such a discount only where the customer executed an affidavit to the effect that it had received an offer of an equally low price from its supplier's competitor. A seller which extends a competitive discount is under an obligation to determine from time to time whether the competitive situation which created the justification for the discount continues to exist, especially where intervening economic conditions should put the seller on notice that there has been a restructuring of competitive conditions in the marketplace. See *re Beatrice Foods Co.*, 68 F.T.C. 286, 350-51 (1965).

Thus, price differentials between different purchasers which tend substantially to lessen competition are consistent with the Robinson-Patman Act if they (1) are cost justified; or (2) are necessary in good faith to meet competition. For purposes of applying its pricing regulations, DOE will assume that all discounts and price differentials in effect on May 15, 1973, were permissible under the Robinson-Patman Act.

DOE's class of purchaser requirements are intended to be and should be construed as being consistent with requirements of the Robinson-Patman Act. Thus, in determining whether a price differential in effect on May 15, 1973, was a customary differential which shall be maintained with respect to a class of purchaser, DOE will take into account whether the differential in question falls into one of the categories of differentials justified under the Robinson-Patman Act.

If a price differential was justified under that Act because it reflected cost savings to the supplier and that differential is otherwise determined pursuant to DOE regulations to repre-

sent a "customary" price differential, DOE will generally require that a class of purchaser be established to reflect that differential, since presumably the justifications under the Robinson-Patman Act are as valid currently as they were on May 15, 1973.

If, however, a price differential can be justified only as a competitive discount under section 2(b) (i.e., made in good faith to meet an actual lower bona fide offer or to offset a price war subsidy of a competitor), DOE will not require that a separate class of purchaser be established to reflect that differential. This is so because such dramatic changes in the pricing and competitive structure of the petroleum industry took place during the summer and fall of 1973 that it is unlikely, at least in the absence of DOE price controls, that a supplier could, at any time after September 1, 1973, justify in a Robinson-Patman Act suit a competitive discount if it existed exclusively on the basis that it was necessary to meet a lower offer made by a competitor on or before May 15, 1973. Moreover, a true competitive discount does not fall within any of the factors listed in § 212.31 to be taken into account in determining a customary price differential.

The foregoing policy of allowing suppliers to eliminate price differentials originally given in response to local competitive conditions is consistent with the general policy of the class of purchaser doctrine to require sellers to give similar prices to purchasers which are similarly situated, and not to require that random price differentials be maintained. This policy will be followed both at the reseller-retailer level, where potential conflict with the Robinson-Patman Act is readily apparent, and at the end-user level, where there is less likely to be actual competition between purchasers and therefore less possibility of conflict with the Robinson-Patman Act. Even though there is less likelihood of conflict with the Robinson-Patman Act at the end-user level, maintenance of price differentials at the end-user level might still, in particular circumstances, result in a lessening of competition, particularly at the primary line level, as well as frustrate the general

policy of allowing random price differentials to be eliminated.

It is important to point out, however, that certain discounts may have been "competitive discounts" in form, having ostensibly been granted to meet a lower offer and with an affidavit having been executed by the buyer to that effect, but may nevertheless also be cost justified under the Robinson-Patman Act. For example, a retail gasoline dealer that owns its retail facility may have been able to obtain a discount from its supplier that was made in good faith to meet a lower bona fide offer. But the willingness of sellers on May 15, 1973, to afford such discounts also reflected cost savings to such sellers, by virtue of the fact that other sales by such sellers were to customers that operated retail facilities owned by and leased from the sellers, and the rental for the facilities was reflected, in part, in the purchase price of gasoline. Similarly, "competitive" discounts on May 15, 1973, may have reflected cost savings attributable volumes purchased or to the fact that the sales were to non-branded rather than branded buyers, since in sales to non-branded customers sellers ordinarily do not incur certain expenses or do not provide certain services (such as a trademark license) that are incurred or provided in connection with sales to branded customers.

Thus, as a general rule the DOE will not require classes of purchaser to be established to maintain price differentials which on May 15, 1973, were in effect only to meet an equally low offer of a competitor. But the DOE will look behind broad assertions that a particular differential was a "competitive" discount and will determine whether in fact the differential was extended to meet a competitive offer and, even if it was, whether it was equally justifiable on a cost basis. Where there is an equally strong cost justification for a "competitive" discount, DOE will require it to be continued.

The position taken herein obviates most of the need for the presumption in Ruling 1974-18, noted above, to the effect that a discount on May 15, 1973, that had been or was expected to be in effect for six months or more is "cus-

tomary." The presumption was intended to provide guidance primarily on the issue of whether a truly transitory competitive discount was "customary." Since this Ruling concludes that competitive discounts in effect on May 15, 1973, may generally be weight averaged to determine a single price for all purchasers in a class, regardless of the length of time they were intended to be in effect, the presumption is no longer necessary, with respect to such discounts. Cost justified discounts, on the other hand, are generally to be considered "customary" regardless of the length of time they had been or were intended to be in effect as of May 15, 1973. Ruling 1974-18 continues to have viability, however, insofar as it provides a means of distinguishing special, short-term sales and other temporary allowances that were neither cost justified nor given in response to competitive conditions, and which represented random price differentials, from longer-term discounts, which are more likely to reflect differences in location, volume, type of purchaser, etc., and therefore to represent "customary" price differentials.

C. Class of purchaser membership. Rulings 1974-17 and 1974-18 have been incorrectly construed by some persons as requiring a supplier generally to maintain certain discounts in effect on May 15, 1973, to the same purchasers which received them on that date, possibly because the rulings were stated as hypothetical examples involving particular purchasers. No such construction was intended, however. Rather, a supplier must maintain the applicable customary price differential to the same class of purchaser. The membership of the class is to be determined by the same objective standards applied by the seller on May 15, 1973. Thus, for example, if a particular customer was receiving a volume discount on May 15, 1973, because its purchases exceeded a certain prescribed volume, the seller does not have to continue to offer the applicable price differential to the same purchaser if that purchaser's volumes decline below that level. On the other hand, a seller is required currently to offer such a price differential to a purchaser which now meets the minimum

prescribed volume, even though it may not have done so on May 15, 1973.

While membership in a particular class of purchaser is to be determined by objective standards in effect on May 15, 1973, DOE reiterates the position taken in Ruling 1974-17 that a class of purchaser may have only one member, particularly at the end-user level, where a price to a very large volume end-user was often determined on an individually-negotiated basis and reflected a customary price differential between that end-user and all other end-users.

D. Application of this ruling. The class of purchaser concepts described in this ruling will be applied by DOE in determining the lawfulness of all prices charged by sellers of covered products since August 19, 1973, the effective date of Phase IV of the Cost of Living Council's price regulations applicable to the petroleum industry. In other words, sellers which have failed, at any time after August 19, 1973, to maintain distinct classes of purchaser and to reflect customary price differentials, as described herein, will be subject to appropriate remedial action, including appropriate refunds. The remedial actions to be taken or sanctions to be imposed with respect to departures from the class of purchaser requirements as expressed in this ruling will be determined on a case-by-case basis, taking into account the extent to which sellers can establish, with respect to past class of purchaser determinations, a good faith basis under the regulations for the manner in which those determinations were made and the extent to which these matters were resolved in prior compliance proceedings.

DOE recognizes that the general rules stated herein for determining what constitutes a separate and distinct class of purchaser for purposes of DOE pricing regulations may not be easily applicable to all of the myriad types of price differentials that existed in May 15, 1973, and that the strict application of these rules might in fact achieve a result contrary to the general goal that purchasers which for all practical purposes are similarly situated should be grouped in the same class of purchaser. Therefore, to the

extent that strict application of the class of purchaser doctrine, as interpreted herein, does not achieve the desired result or is impractical, both purchasers and sellers adversely affected should, pursuant to Subpart D of 10 CFR, Part 205, promptly apply to the DOE for an exception from the class of purchaser rule. Similarly, any seller which finds the application of this ruling to its business to be unclear should promptly submit to DOE the relevant facts together with a request for interpretation of those aspects of the ruling applicable to its particular factual situation.

ILLUSTRATIVE EXAMPLES

The foregoing general principles are illustrated by the following examples, which are equally applicable to all sellers, including refiners, resellers, reseller-retailers and retailers.

Example 1. On May 15, 1973, Firm A, a refiner, had in effect posted dealer tankwagon prices for gasoline at terminals in City A and in City B. The price in City A was 13.2 cents per gallon and in City B was 13.9 cents per gallon. All sales of gasoline by Firm A at these terminals to gasoline retailers were made at posted prices on May 15, 1973.

The difference in price between those retailers which purchased from Firm A in City A and those retailers which purchased from Firm A in City B is a "customary price differential," which reflects a difference in location of the seller, and which must be preserved by establishing separate classes of purchaser for the respective terminals. The maintenance of price distinctions between City A and City B is ordinarily not objectionable under the Robinson-Patman Act, except in rare instances, because buyers from one terminal are presumably not in competition with buyers from another terminal and/or because such differentials reflect cost savings, such as those relating to Firm A's differing costs of transporting the product to different locations.

Example 2. On May 15, 1973, Firm B, a refiner, had in effect at a particular terminal posted prices for gasoline as follows: (a) A cargo buyer price of 12 cents per gallon, (b) a jobber tanker price of 13 cents per gallon, (c) a dealer tankwagon price of 15 cents per gallon, and (d) an end-user tankwagon price of 16.5 cents per gallon. All sales of gasoline by Firm B at this terminal were made at posted prices on May 15, 1973.

The differences in price between those buyers which bought pursuant to these postings are "customary price differentials" which reflect the different types of purchas-

er involved and which must be preserved by establishing separate classes of purchaser for each type. The maintenance of these price distinctions between types of purchaser is ordinarily not objectionable under the Robinson-Patman Act because purchasers in one category usually do not compete with purchasers in another category, and the price differentials involved are therefore not likely to lessen competition substantially or to injure a competitor.

Example 3. On May 15, 1973, Firm C, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon. All sales of gasoline to branded retailers made by Firm C at this terminal on May 15, 1973, were at the posted price; whereas all sales of gasoline to non-branded retailers made by Firm C at this terminal on May 15, 1973, were at a discount of 1.0 cents per gallon from the posted price of 15 cents per gallon.

The price differential between branded retailers and non-branded retailers is a "customary price differential" which reflects the differences in services and benefits afforded to those respective types of purchasers by Firm C. This kind of price distinction between branded and non-branded retailers is ordinarily not objectionable under the Robinson-Patman Act and for DOE purposes will have been presumed to have been cost-justified on May 15, 1973; it will therefore continue to be so regarded.

Example 4. On May 15, 1973, Firm D, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon. All sales of gasoline to retailers made by Firm D at this terminal on May 15, 1973, were at the posted price, except that Firm D, pursuant to a volume discount schedule, gave discounts from this price of 0.5 cents per gallon for purchases in excess of 50,000 gallons per month, 0.75 cents per gallon for purchases in excess of 75,000 gallons per month, and 1.0 cents per gallon for purchases in excess of 100,000 gallons per month.

Such "volume" discounts are "customary price differentials" reflecting differences in volume of product purchased, and must be maintained through establishment of separate classes of purchaser. The maintenance of these price distinctions according to volumes purchased is not objectionable under the Robinson-Patman Act because they were presumptively cost-justified on May 15, 1973, and will therefore continue to be so regarded.

Example 5. On May 15, 1973, Firm E, a refiner, had in effect at a particular terminal a posted end-user tankwagon price for gasoline of 16.5 cents per gallon. While Firm E had no generally applicable volume or other discount schedule available for end-users, it did make available to most of its very high

volume end-users, certain discounts from the end-user tankwagon price, the amounts of which were determined on an individually negotiated basis. Some such discounts were granted after an equally low offer had been made by a competitor, but others had no such apparent rationale.

In this situation, it is apparent, notwithstanding the fact that certain of the end-user discounts Firm E had in effect on May 15, 1973, were ostensibly granted to meet competition, that for pricing purposes Firm E distinguished its large and small volume end-user customers principally on the basis of volumes purchased. Therefore, Firm E is required to establish a separate class of purchaser for its low volume end-user purchasers and one or more other classes of purchaser for its high volume end-user purchasers. For each class Firm E is required to establish a separate base price by computing the weighted average price to all customers in the class on May 15, 1973, taking into account all temporary or permanent discounts and allowances. The maintenance of these price differentials between high and low volume customers was presumptively valid under the Robinson-Patman Act on May 15, 1973, because they were cost-justified, and therefore they will continue to be so regarded.

Example 6. On May 15, 1973, Firm F, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon. From this terminal Firm F made sales to 100 branded independent dealers that leased their retail stations from Firm F and to 100 branded independent dealers that owned their own retail stations or that leased them from lessors other than Firm F. Those dealers that leased their stations from Firm F paid a nominal monthly rental charge to Firm F, but in an amount well below the market value of the property. Firm F extended to 10 of those dealers that did not lease from Firm F various "competitive" discounts off its dealer tankwagon price in order to meet actual lower bona fide offers of competitors. These 10 dealers were distinguishable from the other 90 dealers that did not lease their stations from Firm F only in that they had received competitive offers from suppliers other than Firm F. No competitive discounts were given to any dealers that did lease their stations from Firm F.

It is apparent that Firm F's prices to its dealers which leased their stations from it included an amount which partially compensated Firm F for its rental of real estate. Therefore, there was a sufficient cost-justified distinction between dealers that leased their stations from Firm F, and those that did not, for Firm F to have given the latter a discount consistent with the Robinson-Patman Act. As noted above, a significant distinction between two purchasers on the

basis of volume, location, type of purchaser, etc., is sufficient to require that they be placed in separate classes of purchaser, notwithstanding that the seller gave them the same price on May 15, 1973. Thus, Firm F is required to place its dealers that lease their stations from it in a separate class of purchaser from those that do not.

Within the latter group, Firm F had given discounts to 10 dealers on May 15, 1973, to meet equally low offers of competitors. Since these are true "meeting competition" discounts, Firm F may eliminate them and must place these 10 dealers in the same class of purchaser as the other 90 dealers which do not lease their stations from Firm F. The base price for that class is determined based on the weighted average of the 15 cents per gallon charged 90 dealers on May 15, 1973, and the lower prices charged on that date to the 10 remaining dealers to meet competition. The base price for the class of purchaser which includes dealers which do lease from Firm F is determined based on a May 15, 1973, lawful selling price of 15 cents per gallon.

Example 7. On May 15, 1973, Firm G charged most of its 500 branded dealers a dealers tankwagon price of 15 cents per gallon for motor gasoline. Included in those dealers were 25 which sold gasoline in connection with car wash operations which they owned. Of the 25 car wash dealers, Firm G had given 20 of them various discounts, determined on an individual basis, to meet equally low offers of competitors. Similar competitive discounts were given to four of Firm G's non-car wash dealers. All of the 25 car wash dealers sold approximately equal volumes of gasoline, and all of them had substantially greater capital investments in their stations and sold higher volumes of gasoline than the rest of Firm G's dealers.

The application of the class of purchaser doctrine here should be similar to its application in Example 5. Firm G is required to treat all 25 of the car wash dealers as being in the same class of purchaser and in a distinct class of purchaser from its 475 non-car wash dealers. This is so because the higher volumes and the substantially greater investments in their stations of the car wash dealers are in themselves justifications under the Robinson-Patman Act for treating the car wash dealers differently. Firm G is not required, however, to maintain separate classes of purchaser for those car wash dealers that had competitive discounts in effect on May 15, 1973, and those car wash dealers that did not, since those car wash dealers that had discounts in effect are distinguishable from other car wash dealers only in that they had received lower offers from a competitor of Firm G. Similarly, with the non-car wash class, Firm G need

not maintain a separate class of purchaser for four non-car wash dealers that received discounts given only to meet competition. The May 15, 1973, lawful selling price component of Firm G's base price for the non-car wash class is therefore the weighted average of 15 cents per gallon for 471 dealers and the lower May 15, 1973, prices afforded to four dealers; the May 15, 1973, lawful selling price component of its base price for the car wash class of purchaser is the weighted average of 15 cents per gallon for five dealers and the lower May 15, 1973 prices afforded to the other 20 members of the class.

Example 8. On May 15, 1973, Firm H, a refiner, had in effect at a particular terminal a posted dealer tankwagon price for gasoline of 15 cents per gallon, and all sales of gasoline to non-branded retailers were made by Firm H at this terminal on May 15, 1973, at a discount of 1 cent per gallon from the posted price of 15 cents per gallon, except that certain non-branded retailers received additional, "competitive" discounts of from 0.2 to 1.3 cents per gallon. These "competitive" discounts were extended by Firm H in order to meet actual lower bona fide offers to those retailers by competitors of Firm H and in each instance the retailer had executed an affidavit to that effect. All such discounts in effect on May 15, 1973, had been in effect for six months, or had been granted for a period of at least six months.

Firm H's branded and non-branded dealers are sufficiently distinguishable from each other on a "type of purchaser" and cost-justified basis that they must be treated as separate classes of purchaser. However, the non-branded retailers receiving competitive discounts were not distinguishable from the non-branded retailers who were not receiving such discounts on May 15, 1973, in terms of location, type of purchaser, volumes of product purchased, terms and conditions of sale (other than the "competitive" discount in question), or any other objective standard which would serve to differentiate the buyers which received discounts from those which did not, nor is there any cost-justification basis upon which a Robinson-Patman Act suit challenging the continuance of the price differentials resulting from such discounts could be defended.

The difference in price between those non-branded retailers that purchased from Firm H with competitive discounts and those which did not is not a "customary price differential" which must be preserved by establishing separate classes of purchaser. Although such discounts would have been treated as "customary" under Ruling 1974-18, they need not be maintained pursuant to this ruling because, in construing the intent of DOE regulations to be consistent with the policies of the Robinson-Patman Act, there is not now any objective justifica-

tion for affording one competitor a price advantage over another. This ruling therefore supersedes Ruling 1974-18 in this respect. The competitive discounts in this example, although not requiring a separate class of purchaser to be established, must nevertheless be taken into account in determining the weighted average selling price to the class of purchaser concerned on May 15, 1973.

[40 FR 10655, Mar. 7, 1975]

RULING 1975-3—RETAILING OF GASOLINE; PROSPECTIVE INCREASES IN RENT FOR REAL PROPERTY

Facts. Firms S and O are engaged in the refining and marketing of petroleum products, including motor gasoline. Individuals A and B, retailers of motor gasoline, lease the real property used in their retailing operations from Firms S and O, respectively.

1. On May 15, 1973, Individual A paid a monthly rental to Firm S in the amount of 2.2 cents per gallon of gasoline pumped during the month, pursuant to the prevailing terms of the lease agreement between Firm S and Individual A. This lease agreement is due to expire, and Firm S proposes to enter into a new one year lease agreement with A at a stated monthly rental rate of 2.5 cents per gallon of gasoline pumped during the month. Firm S has submitted a lease document to this effect for A's signature. A disclaimer attached to this document states that the increased rental stated in the proposed lease is not to become effective until "permitted" by Federal law. In the meantime, the disclaimer states that S will charge only the maximum rental permitted by DOE's regulations and that the proposed lease "should not be taken as an increase, offer to increase or notice of intent to increase your current rental."

2. On May 15, 1973, Individual B paid a monthly rental to Firm O of 2 cents per gallon of gasoline pumped during the month, pursuant to the prevailing terms of the lease agreement between Firm O and Individual B. This lease agreement has expired, and B's tenancy is now on a month-to-month basis. Firm O proposes to enter into a new one-year lease agreement with B at a stated monthly rental of 2.5 cents per gallon of gasoline pumped during the month. However, the 2.5 cents rental term is not to

become effective until two conditions have occurred:

(a) The expiration of any Federal law prohibiting the implementation of the increased rental stated in the lease; and

(b) The expiration of a 60-day period, beginning with the first date on which an increased rental could lawfully be implemented, during which time the lessee has the unilateral option of terminating the lease agreement without penalty. Firm O has submitted a lease document to this effect for B's signature.

Issue #1. Is the conditional rental term proposed by Firm S in the lease offered to Individual A prohibited by DOE's Mandatory Petroleum Price Regulations, notwithstanding Firm S's disclaimer?

Issue #2. Is the conditional rental term proposed by Firm O in the lease offered to Individual B prohibited by DOE's Mandatory Petroleum Price Regulations, even though Individual B has the unilateral option to terminate the lease agreement, without penalty, before the rental increase becomes effective?

Ruling. 10 CFR 212.103 states, in relevant part, as follows:

A lessor or lessee of real property used in retailing gasoline may not—

(a) Increase, offer to increase, or give notice of intent to increase the rent for that real property to an amount in excess of the base rent as defined in § 212.102 * * *.

"Base rent" is defined, in § 212.102, as "the rent charged for that station pursuant to the contractual terms prevailing on May 15, 1973."

1. Firm S proposes to enter into a lease agreement with Individual A under which the rent for the real property involved will automatically increase, upon the expiration of controls, to an amount in excess of the base rent for that property. Under the proposed rental escalation clause, Individual A would have no recourse from the obligation to pay the increased rental upon the expiration of DOE controls on rent (i.e., satisfaction of the condition precedent). Under such circumstances, the 2.5 cent per gallon rental term contained in the lease agreement constitutes a "notice of intent to increase the rent * * * to an

amount in excess of the base rent * * *" which is prohibited by § 212.103(a), notwithstanding the disclaimer of Firm S to the contrary.

2. Firm O, on the other hand, proposes a lease agreement under which the rent for the real property involved will increase only upon the expiration of controls coupled with Individual B's decision, after a reasonable period of time, not to terminate the lease agreement. Individual B has, therefore, agreed to a rental escalation at some as yet undetermined date; but upon determination of that date, B holds the unilateral option to reconsider his prior decision respecting the propriety of the rental increase and to reject or accept the lease under the new rental terms. Although the increased rental term stated in the lease represents a rent which is in excess of the base rent for the property, Firm O has not proposed an agreement to be entered into now which will irrevocably bind Individual B to the increased rental at some later date. In light of Individual B's option to terminate the lease rather than pay the increased rental, the lease provisions proposed by Firm O, when considered together, are properly regarded as rental renegotiation provisions. Under such circumstances, the 2.5 cent per gallon rental term contained in the lease agreement does not constitute a "notice of intent to increase the rent * * * to an amount in excess of the base rent * * *" for purposes of § 212.103(a).

For reasons which are more fully detailed below, the lease terms proposed by Firm O are not inconsistent with 10 CFR 212.1(c), which deals with rental renegotiation provisions depending for their operation upon the modification or termination of the Economic Stabilization Program.

DISCUSSION

Subpart G of Part 212 of the Federal Energy Office regulations, including § 212.103(a), exists in its current form by virtue of DOE's general mandate contained in the Emergency Petroleum Allocation Act of 1973 as amended (Pub. L. 93-159), to promulgate a regulation which provides for the "mandatory allocation of crude oil, residual

fuel oil, and each refined petroleum product, in amounts specified in * * * and at prices specified in * * * such regulation." (Emphasis added.) In complying with its pricing mandate, the DOE has concluded that the leasing of real property used in the retailing of gasoline, between suppliers and retailers, is inextricably woven into the fabric of suppliers' marketing systems and is directly related to the price at which gasoline is sold at retail. The price charged for product and the rent charged for the property, each of which is often expressed as a flat rate in cents per gallon, constitute a combined charge to the retailer for the privilege of purchasing and retailing gasoline. In light of this circumstance, increases in either the product price or the property rental impact upon the retailer-lessee in precisely the same manner—the result is an increased economic burden upon the retailer for the purchasing and retailing of product. The DOE has therefore determined that its statutory mandate to regulate the price of refined petroleum products requires the regulation of rents charged between suppliers and retailers in service station leases as an integral part of its petroleum pricing regulations.

The purpose of the § 212.103(a) prohibition against a "notice of intent to increase" rentals above the base rent is to prevent lessors of real property used in the retailing of gasoline from taking advantage of a period during which price and allocation controls have reduced the operation of competitive forces in the marketplace, to obtain an irrevocable commitment from lessees to pay increased rentals during some future period when market conditions might not otherwise justify such a rental rate. Under these conditions, lessees would have little choice but to agree to such increases now, in order to maintain their ongoing business in a leased retail facility. Although the increased economic burden to a lessee represented by such a commitment would be deferred until such time as its imposition would be permitted under applicable Federal law, the fact that such a commitment is exacted at a time when the imposition of such increases is prohibited by

DOE regulations has led to the prohibition of such commitments per se.

Where, however, the agreement to pay a rental higher than the "base rent" for the property is revocable, DOE's purpose in prohibiting prospective rental increases is not frustrated. This is especially so under circumstances in which the final determination as to whether or not the rental increase is to be accepted is made at a time during which there is no Federal law that may be applied to restrict or prohibit such an increase. Accordingly, such a tentative agreement is not deemed to be a "notice of intent to increase the rent for that real property" within the meaning of § 212.103(a) of the DOE's price regulations. Rather, lease provisions such as those proposed by Firm O, when considered together, are properly treated as rental renegotiation provisions and, as such, are not prohibited by § 212.103(a).

10 CFR 212.1(c) states, in relevant part, as follows:

Price renegotiation provisions in price or rent contracts which depend for their operation upon the modification or termination of the Economic Stabilization Program, were previously declared to be inoperative as unreasonably inconsistent with the goals of the Economic Stabilization Program. Such renegotiation provisions continue to be inoperative as unreasonably inconsistent with the goals of both the Economic Stabilization Program and the Federal Energy Office.

Renegotiation provisions, such as those described in § 212.1, were first declared to be inoperative as inconsistent with the goals of the Economic Stabilization Program in Executive Order No. 11695, issued on January 12, 1973. This order delegated to the Chairman of the COLC all authority vested in the President by the Economic Stabilization Act of 1970 as amended (Pub. L. 92-210) and included the following requirements concerning renegotiation provisions:

Renegotiation provisions in price, rent, wage, or salary contracts which are dependent for their operation on modification or termination of the Economic Stabilization Program are hereby declared inoperative as unreasonably inconsistent with the goals of the Economic Stabilization Program * * * this order shall not operate to permit:

(i) A retroactive increase in prices, rents, wages, or salaries for goods or services sold or leased or work performed while the prices, rents, wages or salaries were subject to the rules of the Price Commission or the Pay Board, or

(ii) A prospective increase in prices, rents, wages, or salaries under the terms of a contract subject to a Price Commission or Pay Board decision and order, except to the extent consistent with such decision and order.

Such renegotiation provisions continued to be inoperative throughout the existence of the Cost of Living Council.

On December 26, 1973, the Chairman of the COLC issued COLC Order No. 47 redelegating a portion of his authority to the recently established Federal Energy Office. Order No. 47 stated, in relevant part, as follows:

[T]here is hereby delegated to the Administrator of the Federal Energy Office authority to make determinations and take actions required or permitted by the Economic Stabilization Act of 1970, as amended, with respect to petroleum products and crude oil and the leasing of real property used in the retailing of gasoline.

Since Executive Order No. 11695 required that renegotiation provisions generally be declared inoperative, and since authority to enforce this requirement as regards the pricing of crude oil and petroleum products and the leasing of real property used in the retailing of gasoline had been redelegated to the Administrator of the Federal Energy Office, the FEO promulgated the provisions contained in § 212.1 quoted above on January 14, 1974. In so doing, the FEO intended to render inoperative only renegotiation provisions in contracts which irrevocably bind the purchaser or lessee to continue to purchase product or pay rental beyond the period of controls and at some as yet undetermined but possibly increased rate. Where a continuing irrevocable purchase or rental obligation exists, and renegotiation of the price or rental term is required, a renegotiation requirement is tantamount to an irrevocable commitment to pay some incremental increase in the price or rental at a future date. Such renegotiation provisions are therefore inoperative as inconsistent

with the purpose of DOE regulations regarding prices and rents.

Where, however, there is no irrevocable commitment on the part of a purchaser-lessee to purchase product or pay rental beyond the period during which Federal law operates to restrict such prices and rentals, contract provisions providing for the renegotiation of price or rental terms are not susceptible to being used in a manner that would jeopardize the effective implementation of DOE's regulations covering prices and rents. Accordingly, 10 CFR 212.1 has no impact on renegotiation provisions under such circumstances.

[40 FR 17980, Apr. 24, 1975]

RULING 1975-4—STORAGE TANK RENTALS; DENIAL FOR MODIFYING PRACTICES

Facts: Firm X and Firm Y sell propane at both the wholesale and retail marketing levels. As an incentive to prospective buyers to purchase propane, Firm X on May 15, 1973 provided certain of its purchasers with propane storage tanks, free of charge. Firm Y, on the other hand, leased propane storage tanks on May 15, 1973 to certain of its purchasers at an annual rental of \$25. Both firms supplied these storage tanks upon the condition that the tanks may be filled only by the owner of the tank or upon the owner's authorization.

Firm X has notified its purchasers that it will no longer provide storage tanks free of charge, but instead has offered to sell the tanks to its purchasers. Firm Y has notified its purchasers that its rental rates on storage tanks will be increased and that the increased rental payments are to be made on a monthly, instead of a yearly, basis. In addition, Firm Y plans to institute a minimum volume purchase requirement whereby tank rental payments will be further increased for those purchasers who do not accept delivery of a specified minimum volume each month.

Issue #1: May Firm X now refuse to provide storage tanks free of charge and, instead, require its customers to purchase these tanks?

Issue #2: May Firm Y now increase its storage tank rental rates, alter its

rental payment schedule, or enforce a minimum purchase requirement through increased storage tank rental rates?

Ruling: Neither firm may modify its storage tank practices in the manner described.

Section 212.31 states, in relevant part, that for purposes of 10 CFR Part 212, "[p]rice means any consideration for the sale or lease of any property or services. . . ." In the case of Firm X, certain of its purchasers have enjoyed the use of storage tanks as a service provided in conjunction with their purchase of propane. In those cases where the use of such tanks was provided on May 15, 1973, the price charged for propane on that date included consideration for the use of the storage tanks as well.

That price includes compensation for both product and services provided is also made explicit by § 210.62(c) which states, in relevant part, as follows:

Any practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of these regulations. Such practices include . . . tie-in agreements . . . or failure to provide the same services and equipment previously sold.

These provisions indicate that where a seller ceases to provide services and equipment previously provided in conjunction with sales of its product, such action constitutes, in effect, an increase in the price charged for such product. Such action may constitute a means to obtain a price higher than is permitted by the regulations or may result in the unequal application of increased costs among purchasers. Accordingly, under the terms of § 210.62(c), such activity constitutes a violation of the DOE regulations.

In the case of Firm Y, the fact that the rental charged for a storage tank was separately stated on May 15, 1973 indicates that the price charged for propane may not include consideration for the use of the storage tank. Nevertheless, the fact that the lessee-purchaser is required to fill the tank only in accordance with the lessor-supplier's instructions results in a "tie-in

agreement" within the meaning of § 210.62(c). Such agreements are not necessarily prohibited by the DOE regulations, and where the supplier has customarily imposed such requirements as a condition of the purchase of product, for example, the continuation of this practice may be permitted. (See, e.g., DOE Ruling 1974-23 which states that requiring retail purchasers of gasoline to buy a car wash as a condition of sale is a permissible business practice, providing it was an established practice when DOE regulations went into effect.)

The determination that tie-in arrangements are not prohibited, per se, however, does not mean that alterations in the terms of such arrangements may not constitute "a means to obtain a price higher than that permitted by the regulations," (§ 210.62(c)). As a practical matter, Firm Y's lessee-purchasers of propane must pay Firm Y a combined charge, consisting of the price of propane and the rental on the storage tank, in order to obtain deliveries of fuel. Under such circumstances, the distinction between an increase in the price of propane and a tank rental increase is of no significance to the lessee-purchaser. In either event, the lessee-purchaser's financial obligation for continued supply of product is increased.

In order to insure that the price regulations applicable to the sale of propane are not circumvented, Firm Y may not increase, above the May 15, 1973 level, the rental it charges a lessee-purchaser for storage tanks. Any such increase would constitute "a means to obtain a price higher than that permitted by the regulations" within the meaning of § 210.62(c) of the DOE regulations.

Firm Y's proposal to implement a minimum volume purchase requirement through changes in its storage tank rental fees would also be in violation of DOE price regulations, for the reasons described above, even though the storage tank rental increase would be applicable only to those purchasers which purchased less than the specified volume of propane.

The principles set forth in this ruling govern the application of the DOE regulations to the described

modes of furnishing storage facilities by refiners, resellers, reseller-retailers, and retailers as defined in 10 CFR 212.31. DOE recognizes that many such firms have incurred increased costs associated with furnishing storage facilities through arrangements similar to those described above. Those increased costs constitute increased non-product costs under DOE regulations and, as such, may be passed through in prices charged for product only to the extent and in the manner provided for by the increased non-product cost provisions of the price rules applicable to such firms.

[40 FR 19635, May 6, 1975]

RULING 1975-5—OIL AND GAS RESERVES SURVEY (FORM DOE P-301-S-O): TREATMENT OF CONFIDENTIAL INFORMATION RECEIVED BY DOE

A number of questions have arisen concerning the treatment of information received by the Department of Energy pursuant to the Oil and Gas Reserves Survey (Form DOE P-301-S-O). That form contains two parts, one of which was to be submitted within 10 days of receipt, and the other of which was to be completed and submitted on or before March 1, 1975. These forms were transmitted to operators of oil and/or gas producing wells, by letter dated December 18, 1974, and notice was given in the FEDERAL REGISTER of January 17, 1975 (40 FR 3041) that such persons were required to file this form.

This ruling is issued pursuant to Subpart A of Part 202, Chapter II of Title 10, Code of Federal Regulations (Production or Disclosure under 5 U.S.C. 552), and is designed to inform those persons and companies submitting survey forms, as well as the general public, as to which items of information obtained pursuant to the Oil and Gas Reserves Survey will be made available in response to requests under the Freedom of Information Act (5 U.S.C. 552), as amended, and Part 202 of the DOE Regulations.

Background. The Oil and Gas Reserves Survey is being conducted pursuant to the authorities contained in the Federal Energy Administration Act of 1974 (Pub. L. 93-275) and the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (Pub.

L. 93-319). Section 11 of ESECA states that the information obtained by DOE under authority of ESECA—such as the Oil and Gas Reserves Survey—will be available to the public in accordance with the provisions of the Freedom of Information Act. The Freedom of Information Act requires disclosure of all records not specifically exempted from disclosure; one of these exemptions, however, gives an agency the discretion to decline to release "trade secrets and commercial or financial information obtained from a person and privileged or confidential." That Act also gives the agency discretion to withhold "geological and geophysical information and data (including maps) concerning wells."

As a general matter, agency discretion to release materials that are exempted from the mandatory disclosure provisions of the Freedom of Information Act can be limited by statutes that affirmatively prohibit disclosure. Section 11(d) of ESECA incorporates such an explicit prohibition on disclosure, by providing that the restrictions on disclosure contained in 18 U.S.C. 1905¹ apply to information obtained under ESECA, in certain circumstances. Specifically, these restrictions apply, provided that the person submitting the information first makes a showing that the information, if made public, would divulge methods or processes entitled to protection as trade secrets or other proprietary information. The showing must be satisfactory to the DOE. Section 11(d), in addition to making 18 U.S.C. 1905 applicable only where a satisfactory showing concerning the confidential nature of the information has been made, also makes 18 U.S.C. 1905 inapplicable for purposes of disclosure of information obtained pursuant to ESECA (1) to delegates of the DOE for purposes of car-

¹ 18 U.S.C. 1905 prohibits officers and employees of the United States from disclosing in any manner not authorized by law information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.

rying out the Emergency Petroleum Allocation Act of 1973 or ESECA, (2) to certain enumerated Federal agencies, and (3) to the Congress or any committee of Congress upon request of the Chairman.

In the transmittal letter for the Oil and Gas Reserves Survey, respondents to the survey were informed that before the restrictions on disclosure contained in 18 U.S.C. 1905 could apply, the respondents would have to make the showing specified in section 11(d) of ESECA. This showing would have to be satisfactory to the DOE.

However, even in the absence of a case-by-case showing, DOE is still free to conclude not to disclose information in response to requests under the Freedom of Information Act, provided it believes that the material is exempt from disclosure under that Act and such disclosure would not be in the public interest. Conversely, however, in the absence of the showing required by Section 11(d), DOE may disclose information which otherwise might fall within the prohibition of 18 U.S.C. 1905.

DOE can, of course, also conclude that the showings made invoking 18 U.S.C. 1905 are not in fact adequate, and that disclosure of the information would not divulge methods or processes entitled to protection as trade secrets or other proprietary information.

Ruling. 1. DOE has concluded that, for purposes of requests received from the public for release of records under the Freedom of Information Act, DOE is permitted by Section 552(b) of the Freedom of Information Act, and appears to be required by 18 U.S.C. 1905, to treat the items listed below as confidential. It will therefore treat as confidential, and not release in response to requests under the Freedom of Information Act, Items 13 to 18 of Part II of Form DOE P-301-S-O:

Average daily productive capacity after December 31, 1974.

Principal constraint on production.

Estimated proved reserves—December 31, 1974 (shut-in reserves).

Principal reason for non-production.

Original hydrocarbons in place.

Estimated proved reserves—December 31, 1974 (producing reserves).

1974 gross additions to estimated proved reserves.

Indicated secondary and tertiary reserves—December 31, 1974.

Recovery method for secondary and tertiary reserves.

In brief, DOE has concluded that items 13 to 18 of Part II will not be disclosed pursuant to requests under the Freedom of Information Act because they fall within the exemption set out in section 552(b)(4) of that Act for the following reasons: First, industry practice is to retain such information as confidential; second, substantial competitive injury would result from release of such information to the public; and, third, release of such information could seriously impede DOE's ability to obtain such information in the future. In addition, this information may be considered geological or geophysical information, which is exempted from disclosure by 5 U.S.C. 552(b)(9).

The competitive injury which would result from public release of items 13-18 stems from current industry practice of treating as confidential all estimates of future productive capacity and estimated reserves. Release of such information would give prospective purchasers of oil and gas rights information which previously was not available to them and would place them in an improved bargaining position, to the detriment of the survey respondent. Similarly, release of this information would improve the bargaining position of other parties in proposed unitization agreements, to the detriment of the survey respondent.

Information on estimated productive capacity and reserves is also valuable proprietary information in cases where leases are available in the vicinity of the field in question, because this information indicates the likely value of the neighboring leases; release of this information to the public would remove the competitive advantage of the survey respondent and would result in corresponding competitive injury.

Information on secondary and tertiary reserves and recovery methods (Item 18) could, in addition, reveal the success of new recovery methods, thereby permitting competitors to avoid the financial risks of experimentation incurred by the survey respondent.

ent and giving them a commensurate financial advantage.

2. DOE has further concluded that adequate showings have not been made to invoke the provisions of 18 U.S.C. 1905 with respect to Part I and items 1-12 of Part II and that DOE will disclose, in response to requests made pursuant to the Freedom of Information Act, those items. These include historical data on production of crude oil and natural gas, by field; information as to whether the respondent is or has been an operator; and the number of fields of a specified size in which the respondent operated.

The rationale for concluding that Part I and items 1-12 of Part II will be disclosed pursuant to Freedom of Information Act requests is that this information either is clearly not proprietary—such as name and address—or is information that is already publicly available in a number of states and therefore is not considered to be within the Freedom of Information Act exemption from mandatory disclosure for confidential commercial information. Specifically, the names of operators, the fields that they operate, the operator's parent company, if any, and historical data on production of crude oil and natural gas, are all matters of public record in a number of states.

[40 FR 19800, May 7, 1975]

**RULING 1975-6—NATURAL GAS LIQUID PRODUCTS;
PRICING PRIOR TO JANUARY 1, 1975**

On December 20, 1974, DOE issued a new Subpart K to 10 CFR, Part 212, the Mandatory Petroleum Price Regulations, effective January 1, 1975. Subpart K provides regulations designed specifically to cover the pricing of natural gas liquids and natural gas liquid products (propane, butane, and natural gasoline). The pricing of these items was, until December 31, 1974, subject to Subpart E of the DOE price regulations, which applied generally to "refiners," a term defined in 10 CFR 212.31 to include a firm that "refines liquid hydrocarbons from oil and gas field gases * * *." Both refiners of crude oil and of natural gas and natural gas liquids are included within this definition. The new Subpart K was adopted to provide a set of price rules

tailored to the purpose of regulating the prices charged for liquid products produced from natural gas, since the process of extracting liquid hydrocarbon products from natural gas differs in significant respects from the process of refining such products from crude oil.

In adopting the new Subpart K regulations, the DOE intended to accomplish three basic objectives: First, to provide a specific method by which maximum lawful prices for natural gas liquid products shall be computed, including a method by which increased product costs may be passed through in prices charged for products; second, to provide a method by which those entities whose May 15, 1973 selling prices for natural gas liquid products were abnormally low could adjust their prices to reflect more closely industry-wide average prices for those products on that date; and third, to provide a method by which refiners may pass through increased non-product costs attributable to gas plant operations.

To accomplish the first of these objectives, DOE provided for the passthrough of increased product costs associated with obtaining natural gas liquids and liquid products, expressly including increased costs of natural gas shrinkage, in a manner analogous to that provided in Subpart E of the DOE regulations for the passthrough of increased product costs. The reason for implementation of this method of increased cost passthrough was, in part, to provide a specific method by which the increased costs of raw materials associated with gas processing may be recovered in the prices charged for products that is basically equivalent to the method by which the increased costs of raw materials associated with crude oil refining may be recovered in prices charged for products. For processors of natural gas, the equivalent of increased product cost is the increase in the cost of "shrinkage" which occurs in the natural gas stream as a result of the extraction of natural gas liquids. The refiner's price rules of Subpart E, which applied to prices charged for natural gas liquid products until December 31, 1974, provided for the passthrough of

increased product costs, but did not expressly indicate that sellers of natural gas liquids and liquid products could recover increased natural gas "shrinkage" costs as increased product costs, in prices charged for processed products.

To accomplish the second objective, DOE provided in Subpart K for the use of adjusted May 15, 1973 prices by those firms that had May 15, 1973 selling prices for natural gas liquid products that were below average.

To accomplish the third objective, DOE included in Subpart K a provision for the passthrough, in prices charged for processed products, of actual increases in non-product costs attributable to gas plant operations, subject to a maximum limitation of \$.005 per gallon.

The changes in the regulations effected by Subpart K were prospective. The DOE has concluded, however, that the basic issues which the Subpart was intended to resolve have been in existence since the inception of DOE regulations, and that, insofar as practicable, they need to be resolved with respect to the period prior to January 1, 1975, during which Subpart E applied to the pricing of natural gas liquid products, particularly in view of the fact that DOE compliance actions, as well as private rights, remain dependent in large measure upon the application and interpretation of Subpart E to natural gas liquid product price determinations.

DOE is therefore issuing this ruling to make clear that increased costs of natural gas shrinkage could be passed through as increased product costs pursuant to the provisions of Subpart E, and, generally, to more clearly describe the application of the price rules of Subpart E in determining natural gas liquid product prices, before Subpart K became effective on January 1, 1975.

Also, since there were no provisions in Subpart E for use of adjusted May 15, 1973 prices by those firms that had lower than average prices on that date, and since the atypical pricing patterns of May 15, 1973, which are permitted to be adjusted by Subpart K, have affected firms since before the effective date of Subpart K, the DOE

is proposing, concurrently with the issuance of this ruling, a class exception to permit the adjusted May 15, 1973 prices of Subpart K to be applied retroactively. The exception proposal also contains provisions to afford passthrough of actual non-product cost increases incurred prior to January 1, 1975, subject to a specific per gallon limitation.

Facts: Firms A, B and C are "refiners," as defined in 10 CFR 212.31, which process natural gas or natural gas liquids and recover natural gas liquid products (propane, butane and natural gasoline), which they sell. During 1974, Firms A, B and C obtained natural gas or natural gas liquids for processing in their plants under three different arrangements:

(1) Firm A purchased a mixed stream of natural gas liquids at a fixed price per gallon from Firm X, a firm which had extracted the natural gas liquids from natural gas. Firm A fractionated the mixed stream of natural gas liquids and sold the resulting natural gas liquid products;

On May 15, 1973, Firm A purchased the mixed stream of natural gas liquids from Firm X at a rate of 6 cents per gallon for the propane content, 6.5 cents per gallon for the butane content, and 8.5 cents per gallon for the natural gasoline content. During November 1974, Firm A purchased the mixed stream of natural gas liquids at a lawful rate of 8 cents per gallon for the propane content, 8.5 cents per gallon for the butane content, and 10.5 cents per gallon for the natural gasoline content.

(2) Firm B purchased "wet" natural gas under a "net back" contract arrangement with Firm Y, a natural gas producer. Title to the "wet" natural gas passed to Firm B at the wellhead, and Firm B transported the gas to its gas plant, where the natural gas liquids were extracted and fractionated into natural gas liquid products. Both the natural gas liquid products and the residue gas were sold by Firm B, subject to the "net back" arrangement with Firm Y. Firms B and Y shared in the proceeds from the sale of the natural gas liquid products and from the sale of the residue gas on a percentage basis. On May 15, 1973, Firm B sold its

residue gas at a rate of 23 cents per MCF, and in November, 1974, it sold the residue gas at a rate of \$1.50 per MCF; and

(3) Firm C produced and processed "wet" natural gas in its plants to extract natural gas liquids and to fractionate those liquids into natural gas liquid products. Firm C sold the natural gas liquid products and the residue gas. On May 15, 1973, Firm C sold its residue gas at a rate of 22.3 cents per million BTU's and in November, 1974 it sold the residue gas at a rate of \$1.45 per million BTU's.

On May 15, 1973, Firms A, B and C all sold the natural gas liquid products from their gas plants to Firm M, a distributor and marketer of natural gas liquid products, at 7.5 cents per gallon for propane, 8 cents per gallon for butane, and 10 cents per gallon for natural gasoline.

Issue: For months prior to January 1975, how should Firms A, B and C have computed the amount of increased product costs which were available for recovery in the base prices of their natural gas liquid products pursuant to § 212.83?

Ruling: It is an underlying principle of all of DOE pricing regulations that refiners, resellers and retailers of crude oil and petroleum products be permitted to recover increases in their product costs on a dollar-for-dollar basis in the prices permitted to be charged. Section 4(b)(2)(A) of the Emergency Petroleum Allocation Act of 1973 generally provides that recovery of increased product costs be permitted on a dollar-for-dollar basis.

Thus, for example, in implementing this principle, the "base price" for products sold by a refiner under DOE's pricing regulations (and before that under the Cost of Living Council's regulations) has been defined by the following general rule:

The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973 and measured pursuant to the provisions of § 212.83.

Section 212.83(b) of the DOE regulations (which is identical to the corre-

sponding section of the predecessor CLC regulations in Title 6 of CFR) includes within the definition of "increased product costs" for products refined and sold by a refiner, "the difference between the total costs of crude petroleum during the month of measurement and the total cost of crude petroleum during the month of May 1973. . . ." Methods for computing this difference and allowing it to be passed through on a dollar-for-dollar basis are described in the refiner's cost formulae contained in § 212.83(c).

Although Subpart E of Part 212 of DOE's regulations specifically address only the passthrough of the increased cost of crude petroleum and petroleum product, a comparable dollar-for-dollar passthrough of increased shrinkage costs is also permitted for the reasons stated above. A dollar-for-dollar passthrough of all increased product costs may therefore be achieved by firms A, B and C in the foregoing fact situations as follows:

Firm A. Firm A is entitled to increase its May 15, 1973 selling price for its natural gas liquid products in the month following the month of measurement to reflect increased costs of the mixed gas liquid stream which it purchased for processing during the month of measurement. Since Firm A purchases its mixed stream at a fixed price per gallon, its increased product costs under § 212.83 are equal to the difference between the per gallon cost of the mixed stream on May 15, 1973 and the per gallon cost during the month of measurement multiplied by the number of gallons purchased by Firm A during the month of measurement.

Firm B. In many instances in which natural gas is processed pursuant to "net back" arrangements, such as that between Firms B and Y, the equivalent of increased product costs incurred by crude oil refiners is the increased cost of natural gas shrinkage. That is, an increase in the amount by which the value of the unprocessed natural gas is reduced through processing. This reduction in value is often referred to as the cost of natural gas "shrinkage." The cost of such shrinkage is the reduction in sales revenues that could otherwise have been re-

ceived for the natural gas pursuant to the contract under which the gas is being sold, if its volume or BTU content had not been reduced through processing to extract natural gas liquids.

Accordingly, where the natural gas sales revenues are reduced by processing, and where the selling price of the natural gas that has been processed has increased since May 15, 1973, the cost of shrinkage resulting from extraction of the liquids will also have increased. The DOE considers this increased shrinkage to be an "increased product cost" under § 212.83 and it may therefore be recovered on a dollar-for-dollar basis in Firm B's base prices for natural gas liquid products in the month following the month of measurement.

The cost of shrinkage shall be determined by comparing the value of the natural gas prior to processing with the value of the natural gas after processing. The value of the natural gas stream for this purpose shall be computed by reference to the contractual terms in effect for the sale of Firm B's "residue" natural gas during the relevant month. For example, since the sale of residue gas by Firm B was made on a volumetric basis, shrinkage costs incurred by Firm B as a result of extraction from the gas stream must be calculated on a volumetric basis. On the other hand, if Firm B sold its residue gas on a \$/MMBTU basis during the relevant month, its shrinkage costs would be determined on the same basis. Any increase in the cost of shrinkage shall be determined by comparing the cost of shrinkage respecting a particular stream during the month of May, 1973, with the cost of shrinkage during the month of measurement.

Since there is no sale of the natural gas liquid products and the residue gas under the "net-back" arrangement for which a per-unit price can be determined until after the gas has been processed, the increased cost of shrinkage is calculated with respect to residue gas sold in the month of measurement and is then applied in the month following the month of measurement to the May 15, 1973 selling price of the natural gas liquid prod-

ucts with the proceeds from these sales by Firm B apportioned between Firm B and Firm Y as provided by the "net-back" agreement.

Firm C. Firm C also incurs "shrinkage" costs when it removes natural gas liquids from its natural gas stream since the revenues received for its natural gas stream are thereby reduced. Firm C is therefore entitled to recover its shrinkage costs on a dollar-for-dollar basis under § 212.83 in the same manner as Firm B, above.

(40 FR 23272, May 29, 1975)

RULING 1975-7.—EXPORT SALES; RESCISSION

(NOTE: This Ruling rescinds, pursuant to 10 CFR 205.152, that portion of Ruling 1974-27 ("Allocation of Refiner's Increased Product Costs to Sales Volumes") which dealt with export sales. Upon further consideration of this aspect of Ruling 1974-27, DOE has determined it to be inconsistent with principles incorporated in related provisions of the DOE regulations.)

Facts: Firm A, a refiner subject to the Department of Energy (DOE) Mandatory Petroleum Price Regulations, sells most of its covered products to domestic purchasers. Some of the covered products sold by Firm A, are however, sold for export to points outside the United States.

Issue: How should Firm A allocate its increased cost of crude oil under 10 CFR 212.83(c) with respect to export sale transactions?

Ruling: Pursuant to 10 CFR 212.51 and 10 CFR 212.53, prices charged with regard to export sales of covered products are exempt from the price rules prescribed in 10 CFR, Part 212, except that revenues from such sales are taken into account for purposes of computing a firm's profit margin.

Since export sales are exempt from price controls, DOE has concluded that such sales should be accounted for by refiners in the same manner as sales of petroleum products which are not covered products, and which are therefore also sales which are exempt from price controls. This treatment affords the export sale exemption the same scope as the exemption for petroleum products which are not subject to the Emergency Petroleum Allocation Act of 1973, and is consistent

with the objectives of the export sale exemption.

Pursuant to 10 CFR 212.83, refiners are required to allocate their total increased cost of crude oil, on the basis of the volume of products sold, between covered products (i.e., products subject to DOE price controls) and other products which are refined from crude oil, but which are not covered products because they are not within the scope of the Emergency Petroleum Allocation Act of 1973.

Thus, for example, if 90 percent of the volume of products sold by a refiner consists of "covered products," 90 percent of that refiner's increased cost of crude oil may be allocated to covered products and passed through, on a dollar-for-dollar basis, in the prices charged for those products. The remaining 10 percent of that refiner's increased cost of crude oil is allocated to products which are not covered products, and cannot be passed through in prices charged for covered products.

Since there are no price regulations with respect to products refined from crude oil, but which are not covered products, the regulations do not require any calculations by refiners as to whether the increased cost of crude oil attributable to sales volumes of non-covered products are recovered in sales of those products. Similarly, the regulations afford no basis for any increased cost of crude oil attributable to non-covered products to be recovered in sales of covered products, even if those increased costs are not fully recovered in sales of non-covered products.

The purpose of the required allocation of the increased cost of crude oil between covered products and non-covered products was to insure that the amount of increased cost of crude oil permitted to be passed through, on a dollar-for-dollar basis, in prices charged in regulated sales would reflect only that portion of increased crude oil costs attributable to the volume of crude oil refined to produce the products sold in such regulated sales, and to exclude the amount of increased cost of crude oil attributable to the production of products sold in exempt sales.

Thus, although export sales may be sales of products which fall within the 10 CFR 212.31 definition of "covered product," they are nevertheless sales that are exempt from price regulations by virtue of §§ 212.51 and 212.53. Therefore, for purposes of allocating increased costs of crude oil pursuant to § 212.83, export sales volumes must be included among the sales volumes of "all products refined from crude oil other than covered products * * *" in the "V" factor of the refiner's price formulae. This insures that no more than a pro rata share of the increased cost of crude oil can be passed through in prices charged in sales which are subject to price regulations.

This result is consistent with the objectives of the export sale price exemption. Price controls were implemented to benefit United States consumers and the domestic economy. Export sales are exempt from such regulations, not only because there is no intention to benefit foreign buyers through price controls, but also to encourage that the best possible prices be obtained in such sales and thereby to assist in maintaining a favorable trade balance. Since the pro rata portion of increased crude oil costs attributable to such sales is excluded from the permissible passthrough on domestic sales, domestic consumers are not adversely affected by the export sale exemption.

It should be noted that, to the extent that Ruling 1974-27 required refiners to reduce the amount of increased cost of crude oil available for passthrough in sales of covered products when they recovered more than a pro rata volumetric share of increased cost of crude oil in export sales, the DOE has concluded that the Ruling imposed a requirement that was not consistent with the exemption afforded such export sales by §§ 212.51 and 212.53.

[40 FR 30037, July 17, 1975]

RULING 1975-8—QUALIFICATION OF CERTAIN COMMISSIONERS AS WHOLESALE PURCHASER-RESELLERS; GENERAL GUIDANCE

Facts: Firm A is engaged in the business of marketing allocated products under a written consignment agree-

ment with Supplier B. The agreement establishes a relationship whereby Firm A receives a commission for selling and delivering products, title to which remains with Supplier B until they are sold. Firm A transfers the products to customers at a price fixed by Supplier B. Firm A is fully responsible for Supplier B's products in his possession, and must account for any shortages that occur. Supplier B has a reasonable right to inspect Firm A's property and records pertaining to such products.

The agreement authorizes Firm A to make credit sales, approved in advance, for the account of Supplier B, but provides that any such sales for its own account, or such credit sales in excess of those approved in advance by Supplier B, are made at Firm A's sole risk.

Firm A is required to furnish all necessary facilities and equipment involved in the storage, handling, and sale of Supplier B's products, as well as to make provision for, and assume all responsibilities and expenses connected with, all necessary labor. All operating expenses, including assessments, taxes, fees, and licenses, arising out of his business or property are to be paid by Firm A.

Firm A is liable by the terms of the consignment agreement for payment of all appropriate employer's liability, workmen's compensation, and unemployment insurance, as well as any employment benefits required by state and federal laws for his employees, and is required to indemnify and hold Supplier B harmless for any claims arising against it therefrom. Firm A withholds, as required by law, amounts for federal and state taxes from payments of salaries or commissions made to its employees. No such amounts are withheld by Supplier B from commission payments made to Firm A under the consignment agreement.

Issue: Does Firm A, operating as a consignee pursuant to the consignment relationship described above, qualify as a wholesale purchaser-reseller as defined in 10 CFR 211.51?

Ruling: Firm A qualifies as a wholesale purchaser-reseller as that term is

defined in § 211.51 of the Mandatory Petroleum Allocation Regulations.

Wholesale purchaser-reseller is defined in § 211.51 as "any firm which purchases, receives through transfer, or otherwise obtains (as by consignment) an allocated product and resells or otherwise transfers it to other purchasers without substantially changing its forms." The phrase "as by consignment" is included in the definition of a wholesale purchaser-reseller to make clear that firms which obtain and resell or otherwise transfer allocated product are not automatically excluded from the definition solely on the ground that they fail to take legal title to the product. This phrase explicitly recognizes the fact that consignment relationships have long existed in the petroleum industry under which consignees performed essentially the same functions as jobbers and that such consignees should be treated under the allocation regulations in the same manner as jobbers. Therefore, those consignees which have a substantial degree of operational independence in the conduct of their business of transfer and sale of a supplier's products (rather than merely providing a distribution service between a supplier and the supplier's customers or functioning like an employee of the supplier) fully qualify as wholesale purchaser-resellers and are subject to the same benefits and obligations of the allocation program which apply to jobbers.

However, not all firms which deem themselves "consignees" qualify as wholesale purchaser-resellers. Whether a firm which operates pursuant to a consignment agreement qualifies as a wholesale purchaser-reseller with in the meaning of § 211.51 depends on the relationships among the consignee, the purchasers to whom the consignee transfers allocated product, and the firm which provides allocated product to the consignee.

The term "consignee" is used in at least three different situations in the petroleum industry. In only one of those situations does a firm which calls itself a consignee qualify as a wholesale purchaser-reseller. First, where the "consignee" has all the characteristics of an employee of the

supplier, but is merely designated a "consignee", he is not a wholesale purchaser-reseller. Second, where the "consignee" operates as an independent contractor but only provides transportation of a supplier's product to the supplier's customers, without any control over the disposition of the product, he is similarly not a wholesale purchaser-reseller, even though he, as an independent businessman, may have a substantial investment in his trucks and terminal facilities. Third, in those situations where a firm receives product through consignment and is engaged in marketing that product to the consignee's customers, acting generally like a jobber, he will qualify as a wholesale purchaser-reseller.

A consignee which operates in the same manner as an independent jobber, and thereby qualifies as a wholesale purchaser-seller, will generally have most (but not necessarily all) of the following characteristics: (a) Appropriate facilities and equipment for the conduct of the business of selling and distributing its supplier's products; (b) responsibility, independent of its supplier, for its internal financial management and physical and administrative operation, (c) responsibility to its supplier and others for expenses and liabilities arising from and connected with the business of transfer and sale of its supplier's products and (d) independent control over the disposition of the allocated product, including the right to enter into and terminate relationships with customers rather than solely being restricted to distributing product to customers designated by the supplier.

According to the terms of the consignment agreement described above, Firm A retains a substantial measure of functional autonomy in distributing and selling Supplier B's products. Although Firm A must account fully to Supplier B for all products received, and such products must be sold at a price fixed by Supplier B, he is fully responsible for all aspects of conducting the business. Firm A does not merely provide a delivery service for Supplier B but solicits its own customers which purchase the products which it has on consignment from

Supplier B. Supplier B provides no facilities, equipment, labor, organizational or employee benefits (such as social security contribution). Thus, Firm A fully qualifies as a wholesale purchaser-reseller.

DOE is aware that the terms of consignment agreements and practices can and do vary greatly. Accordingly, this ruling is intended to provide only general guidance for determining which consignees with factual situations different than Firm A qualify as wholesale purchaser-resellers. Firms which are still in doubt as to their particular status should file a request for interpretation with the General Counsel pursuant to § 205.80 *et seq.*

[40 FR 30037, July 17, 1975]

RULING 1975-9—STORAGE COSTS

Facts. Firm A, a reseller and retailer of propane, purchases propane in large quantities at a location in Texas which has a large underground propane storage facility. The propane is stored in merchant storage at that location for several months, and is then transmitted by pipeline to a pipeline terminal located several hundred miles from Firm A's bulk plant. Propane transmitted by pipeline is dispensed at the pipeline terminal to various parties, in addition to Firm A. Some of the propane received by Firm A at the pipeline terminal is delivered by truck from the pipeline terminal to Firm A's bulk plant, and some is delivered from the pipeline terminal directly to Firm A's large, commercial user customers. Further deliveries of propane are made by truck from Firm A's bulk plant to several of Firm A's retail outlets.

Firm A incurs storage costs for storage of the propane in Texas, a pipeline tariff for transmission of the propane to the pipeline terminal, terminalling charges for services at the pipeline terminal, including transferring the propane from the pipeline terminal to trucks at the terminal, and trucking fees for the delivery of the propane from the pipeline terminal to Firm A's bulk plant, from the pipeline terminal to certain of Firm A's customers, and from Firm A's bulk plant to Firm A's retail outlets.

Issue. Which of these transportation and/or storage charges can be included by Firm A in determining its "weighted average unit cost of a product in inventory" for purposes of determining "increased costs" pursuant to § 212.92?

Ruling. As set forth in Ruling 1975-1:

The "weighted average unit cost of a product in inventory" includes transportation costs incurred in bringing the covered product into the seller's inventory. The cost of product is, in other words, considered to be the "delivered cost" to the buyer. In many instances, the product is purchased at a "delivered price," and there is no separate transportation cost incurred. Where transportation costs are incurred separately in connection with acquiring product, however, they have historically been treated as a cost of acquiring the product. For example, refiners are expressly allowed to treat increased transportation costs associated with obtaining crude oil or covered products as increased product costs, pursuant to the definitions of "cost of crude petroleum" and "cost of petroleum product" in § 212.83(b).

Ruling 1975-1, however, did not expressly deal with charges incidental to transportation, such as storage or terminal charges, nor did it address the questions that arise concerning the point at which product is regarded as being in the seller's inventory, where, as here, a seller takes title to a product at an early point in the overall distribution system for the product concerned.

The purpose of this ruling is to make clear that miscellaneous charges incident to transporting product to a seller, such as storage and terminalling charges, may be treated as transportation costs, and therefore may be included as part of the weighted average unit cost of product in inventory.

This ruling also sets forth the general guideline that transportation and related costs may be included as part of the weighted average cost of product in inventory to the extent that they are incurred in bringing the product into storage at a location that constitutes a part of the buying firm's storage and distribution system. In other words, the costs associated with movement of the product through a distribution system that is used in common to distribute product to vari-

ous firms operating at the same level of distribution as the buying firm may generally be treated as part of the cost of the product to the buying firm.

In the case of Firm A, therefore, application of this general principle means that the transportation and associated costs of bringing propane to Firm A's bulk plant are permitted to be treated as part of that firm's cost of product. Similarly, refiners are generally permitted to treat transportation and associated costs of bringing crude oil to their refineries as part of the cost of crude oil.

As noted in Ruling 1975-1, a firm

... is not, however, permitted to treat increased transportation costs associated with delivering the covered product to its customers as "increased costs" under § 212.92. Such costs are not related to the cost of product to [that firm], but are, rather, a cost of doing business for [that firm], which must be treated as all other non-product costs, and which may be reflected in [that firm's] selling prices only to the extent permitted by § 212.93(b).

Thus, the transportation costs of delivering propane to Firm A's customers, whether from Firm A's bulk plant, or from the pipeline terminal, may not be treated as part of the cost of product to Firm A.

Similarly, the cost of transporting product from Firm A's bulk plant to its retail outlets does not constitute a cost of product to Firm A, but is, rather, a general cost of doing business that is incurred by Firm A.

In summary, therefore, with respect to product sold by Firm A from its bulk plant or from its retail outlets, the cost of product may include the actual price paid for the propane, the cost of storage in Texas, the cost of pipeline transportation, the cost of pipeline terminal charges and the cost of truck transportation to Firm A's bulk plant. With respect to product delivered by Firm A directly from the pipeline terminal to its customers, the Texas storage costs, pipeline costs and pipeline terminal costs may be treated as cost of product, but no truck transportation costs may be included.

It should be noted that in some instances a firm may own or lease a transportation or distribution facility of a kind that more typically would

form part of a distribution system available for use by various firms, rather than a part of the firm's own storage and distribution system. For example, a refiner may own a pipeline by which crude oil is delivered to its refinery, or a reseller may own a facility for transferring imported product from ocean vessels to trucks or railroad cars, for distribution to its bulk plants. In such cases, a firm may treat its actual increased costs of furnishing such facilities as an increased cost of product, provided, however, that such cost increases shall not exceed increases over the May 15, 1973 per unit charges made for comparable facilities or services by unaffiliated third parties. Any firm that claims such increased costs with respect to facilities or services which it furnishes will have the burden of establishing not only that it has actually incurred those increased costs, but also that those cost increases do not exceed increases in the per unit charges made for comparable facilities or services by third parties. Tariffs published by regulatory authorities may be used for measuring compliance with this requirement.

It should also be noted that, as required by Ruling 1975-1, a firm must be consistent in its accounting procedures when computing "weighted average unit cost" of a product in inventory pursuant to § 212.92, and to the extent that transportation and other costs associated with acquiring a product are treated as a product cost for purposes of calculating the current weighted average unit cost of product in inventory, those costs must also be included in calculating the weighted average unit cost of product in inventory on May 15, 1973.

[40 FR 40826, Sept. 4, 1975]

RULING 1975-10—TRANSPORTATION COSTS WHERE TRANSPORTATION IS PROVIDED BY THE FIRM CONCERNED

In Ruling 1975-1 (40 FR 6768, February 14, 1975), the Department of Energy set forth guidelines regarding treatment of increased transportation costs in the calculation of "increased costs" by resellers and retailers pursuant to 10 CFR 212.92. While this ruling helped to clarify the treatment of increased transportation costs

where transportation is furnished by an independent carrier, it did not deal with related questions of increased costs of transportation where the product is transported by the firm concerned, rather than by an independent carrier. This ruling, therefore, is intended further to clarify the definition of "increased costs" as set forth in § 212.92.

Facts. Firm X, a reseller of a covered product, purchases the covered product from Refiner W and sells it to various firms, including Firm Y and Firm Z. Firm X uses its own vehicles to transport the covered product to its own terminal. Firm X also uses its own vehicles to transport the covered product directly from the refinery of Refiner W to Firm Y. Firm X transports the covered product from its terminal to Firm Z, also using its own vehicles. Firm X's costs incurred in connection with transporting the covered product to its terminal, to Firm Y and to Firm Z have increased.

Issue 1. May Firm X treat its increased costs incurred in connection with transporting the covered product from Refiner W to its terminal as "increased costs" as defined in § 212.92?

Issue 2. May Firm X treat its increased costs incurred in connection with transporting the covered product from Refiner W to Firm Y or from its terminal to Firm Z as "increased costs" as defined in § 212.92?

Ruling. Firm X may, subject to certain limitations, treat its increased costs, incurred in connection with transporting the covered product to its terminal as "increased costs" pursuant to § 212.92, but may not treat as "increased costs" its increased transportation costs incurred in connection with transporting the covered product from Refiner W to Firm Y or with delivering the covered product from its terminal to Firm Z.

Pursuant to § 212.92, "increased costs" are defined as "the difference between the weighted average unit cost of a product in inventory and the weighted average unit cost of that product in inventory on May 15, 1973." Thus, "increased costs" are defined to be the increased "cost[s] of a product," and such increased costs are permitted to be passed through, on a

dollar-for-dollar basis, in the prices charged for the product by resellers, reseller-retailers, and retailers pursuant to § 212.93. Conversely, increased non-product costs are permitted to be reflected in the prices charged by resellers, reseller-retailers, and retailers only to the extent permitted by § 212.93(b).

Ruling 1975-1 states:

The "weighted average unit cost of a product in inventory" includes transportation costs incurred in bringing the covered product into the seller's inventory. The cost of product is, in other words, considered to be the "delivered cost" to the buyer. In many instances, the product is purchased at a "delivered price," and there is no separate transportation cost incurred. Where transportation costs are incurred separately in connection with acquiring product, however, they have historically been treated as a cost of acquiring the product.

The intent of Ruling 1975-1, therefore, is to permit resellers and retailers to treat increased transportation charges associated with bringing a covered product into inventory as "increased costs," whereas the subsequent costs of transporting the product, whether to Firm X's customers or to other selling locations of Firm X, are costs of doing business that are not associated with the cost of acquiring the product. Accordingly, Firm X may not treat increased transportation costs incurred when Firm X uses its own vehicles to deliver the covered product directly from Refiner W to Firm Y as "increased costs." The covered product is, in effect, brought into Firm X's inventory when Firm X receives the product from Refiner W. In other words, the "delivered cost" to Firm X is the cost of the product when it receives the product to be delivered to Firm Y. Consequently such increased transportation costs are considered to be a cost of doing business and must be treated as all other non-product costs. Similarly, the increased transportation costs incurred by Firm X in delivering the product from its terminal to Firm Z are considered to be cost of doing business rather than a cost of acquiring the product.

Pursuant to Ruling 1975-1, increased transportation costs associated with bringing a covered product into inventory are considered to be "increased

costs" pursuant to § 212.92. Although Ruling 1975-1 did not deal with an example of a firm that furnished its own transportation instead of using an independent carrier, the rationale for treating the increased costs associated with bringing the product into inventory is the same in both instances, and a firm should not be disadvantaged under the DOE price regulations because it chose to use its own facilities rather than an independent carrier. Accordingly, Firm X may treat its actual increased transportation costs associated with transporting the covered product from Refiner W into its inventory as "increased costs." However, the amount of such increased transportation costs must be established by the firm concerned and may not, in any event, exceed increases in the amount being charged for comparable services by independent carriers (e.g., increases in published I.C.C. tariffs since May 15, 1973). The firm concerned has the burden of establishing not only that it has actually incurred those increased costs, but also that the increased costs it computes as attributable to the cost of transportation do not exceed such third-party rate increases for comparable services.

Finally, as pointed out in Ruling 1975-1,

... in computing the "weighted average unit cost" a firm must be consistent in its accounting procedures. Thus, a firm which includes transportation costs associated with acquiring a covered product as a product cost when calculating its current weighted average unit cost of product in inventory must also include such costs in its calculation of the weighted average unit cost of that product in inventory on May 15, 1973.

[40 FR 40826, Sept. 4, 1975; 40 FR 51414, Nov. 5, 1975]

RULING 1975-11—NEW AND HIGHER COST STORAGE TANKS; RENTALS

Facts: Firms A and Z are sellers of propane at both the wholesale and retail marketing levels. On May 15, 1973, Firm A provided 500 gallon propane storage tanks which it owned for the use of certain of its customers free of charge, on the condition that the tanks could be filled only by the owner of the tank or upon the owner's authorization. Firm Z leased 500 gallon

propane storage tanks to certain of its customers at an annual rental of \$25.00, also on the condition that the tanks could be filled only by the owner of the tank or upon the owner's authorization.

New 500 gallon storage tanks cost Firms A and Z \$250.00 on May 15, 1973. Recently, Firms A and Z purchased several new 500 gallon storage tanks at a cost of \$400.00 each. Firm A has offered to lease the new storage tanks at an annual rate of \$15.00 for a 500 gallon tank. Firm Z has offered to lease the new storage tanks to its customers at an annual rate of \$40.00 for a 500 gallon tank. Both firms have notified their affected customers that the new or higher rental rates are due to the higher cost of acquiring the new tanks.

Issue: May Firm A institute a rental charge for new storage tanks and may Firm Z charge a higher rental rate for new storage tanks, in light of the increased costs associated with the purchase of these tanks?

Ruling: Yes. Firms A and Z can charge new or higher rental rates than were charged on May 15, 1973 for the lease of new storage tanks acquired at a higher cost, but only to the extent that the new or increased rental rate is justified by the higher cost actually incurred in the acquisition of the storage tank being leased. Thus, new or increased rentals may be charged only to customers leasing new tanks from Firms A and Z, and the rental rate may be increased by no more than an amount fairly reflecting the increased cost of the storage tanks since May 15, 1973. Any further increase would constitute "a means to obtain a price higher than that permitted by the regulations" within the meaning of § 210.62(c) of the DOE regulations (See DOE Ruling 1975-4).

The above result is reached by application of 10 CFR 212.31 and 10 CFR 210.62 in accordance with the analysis detailed in DOE Ruling 1975-4. That ruling, in effect, established a presumption that an increase in tank rental rates is regarded as an increase in the price of the product, and, as such, is regarded as a means to obtain a price higher than is permitted by the regulations. That presumption is,

however, overcome where, as here, the storage tanks being furnished have been acquired at higher cost and the amount of new or increased rent being charged for those storage tanks is reasonably related to the increased costs of those storage tanks.

The fact that new or higher storage tank rentals may be charged by Firms A and Z only with respect to customers leasing the new, higher cost storage tank flows from the fact that the practice of furnishing existing storage facilities free of charge, or the rental rates respecting such existing storage facilities have previously been established. Once established, the rental for a previously furnished or leased storage tank is required to be maintained at or below the May 15, 1973 level.

In the case of Firms A and Z, application of this principle justifies a result different from that reached on the facts of Ruling 1975-4 due to the fact of the higher costs associated with the new tanks. Firms A and Z are subject to the requirement of 1975-4 that their charges, if any, for furnishing storage facilities that were furnished May 15, 1973 may not be increased. However, with respect to new tanks purchased at higher cost a new or higher rental than that which was charged on May 15, 1973 for lower cost tanks may be charged. Firms A and Z continue however to be subject to the overall restriction that any instance in which the amount of the new or increased rental for new, higher cost tanks is not reasonably related to the amount of the increase in the cost of storage tanks over May 15, 1973 levels would continue to be regarded as a means of obtaining a price for propane that is higher than permitted by the regulations, and would therefore constitute a violation of the regulations.

Thus, for example, the new rental rate established by Firm A can only reflect the \$150.00 increment in the cost of storage tanks since May 15, 1973, and not the full amount of the current cost of new storage tanks. This is because Firm A's May 15, 1973 prices for propane included the provision of a storage tank that cost \$250.00, and an attempt now by Firm A to obtain rental income for the value of storage facilities previously

furnished free of charge in connection with the purchase of propane would constitute an unwarranted increase in the price of propane. In addition, Firm A's recovery of the \$150.00 increased storage tank cost would have to conform to the conventional practice of spreading the cost over the reasonable life of the tank. Firm Z would be restricted to recovering its \$150.00 increase on the same annual percentage basis which it applied to the basic \$250.00 cost.

Ruling 1975-4 stated generally that increased costs associated with furnishing storage facilities constitute increased non-product costs under DOE regulations, and that, as such, they could only be passed through in prices charged for product to the extent and in the manner provided for by the increased non-product cost provisions applicable to such firms. To the extent that this Ruling permits higher tank rentals to be charged for new, higher-cost tanks, the increased costs of such tanks obviously do not also constitute increased non-product costs for purposes of the non-product cost pass-through regulations, and this Ruling modifies Ruling 1975-4 only to this limited extent.

The principles set forth in this ruling govern the application of the DOE regulations to the described modes of furnishing storage facilities by resellers, reseller-retailers, and retailers as defined in 10 CFR 212.31. These principles are not applicable to refiners, since the type of storage facility discussed herein falls within the express terms of the container cost increase provisions of § 212.87(c)(5)(iv).

[40 FR 40827, Sept. 4, 1975]

**RULING 1975-12—STRIPPER WELL LEASE EXEMPTION;
CALCULATION OF AVERAGE DAILY PRODUCTION
WHERE CURTAILED**

Section 4(e)(2) of the Emergency Petroleum Allocation Act of 1973 ("EPAA", Pub. L. 93-159, as amended, Pub. L. 93-511) reads, in pertinent part:

(A) The regulation promulgated under subsection (a) of this section [DOE price and allocation regulations] shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preced-

ing calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

The Department of Energy implemented this statutory requirement in 10 CFR 210.32 (Stripper well leases), which as originally promulgated afforded an exemption from the Mandatory Petroleum Allocation and Price Regulations for the first sale of crude oil, including condensates, produced in the United States from any property whose average daily production of crude oil, including condensates, for the preceding calendar year did not exceed 10 barrels per well. As recently amended (40 FR 22123, May 21, 1975), the stripper well lease exemption of 10 CFR 210.32 now defines a stripper well lease as a property whose average daily production of crude oil, including condensates, per well did not exceed 10 barrels per day during any preceding calendar year beginning after December 31, 1972.

"Average daily production" for purposes of the stripper well lease exemption is defined in § 210.32 as:

The qualified maximum total production of crude oil, including condensates, produced from a property, divided by a number equal to the number of days in the year times the number of wells that produced crude oil, including condensates, from that property in that year. To qualify as maximum total production, each well on the property must have been maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

The purpose of this ruling is to set forth the guidelines to be applied in those cases where production from a property for which the stripper well lease exemption is claimed appears not to have been maintained at the maximum feasible rate of production or to have been significantly curtailed.

I. Stripper Well Lease Production Requirements. Section 210.32 establishes two criteria that each well on a property must satisfy in order for its production during the measuring cal-

endar year to qualify as "maximum total production." The well must have been (1) maintained at the maximum feasible rate of production, in accordance with recognized conservation practices, and (2) not significantly curtailed by reason of mechanical failure or other disruption in production.

The first requirement, that production be at the maximum feasible rate, reflects the statutory qualifying language "in accord with recognized conservation practices", in recognition of the fact that the practicalities of producing crude oil frequently limit the operation of some wells to a rate of production that is less than the maximum possible rate. For example, some state regulatory bodies establish for each property allowable production rates ("allowables"), which may not be exceeded by the operator. Although it might be possible to produce crude oil from the property at a greater rate than the allowable, the ultimate total recovery of crude oil from the property is maximized where production is held to the more efficient rate. Thus, while a particular property might be capable of producing 1,000 barrels of crude oil per month in the short term, to produce continuously at that rate would result in a lesser total recovery of crude oil from the reservoir than the continuous production of perhaps 800 barrels per month. In this example, production—although not at the maximum possible rate—is, for purposes of the stripper well lease exemption, at the maximum *feasible* rate, in accordance with a recognized conservation practice, as required by § 210.32.

In some cases, the maximum feasible rate of production may be equal to the rate at which crude oil in the reservoir flows into the area of the well-bore from which it is pumped to the surface. For example, if the rate of flow into the area of well-bore is low, perhaps one to two barrels per day, it is common operating practice to allow the crude oil in the reservoir to accumulate in the area of the well-bore for several days before it is pumped. Though the well is not pumping, however, it will be considered to be in operation, and no adjustment to the calculation of average daily production

(as in Part II, below) is required if this practice comports with historical and traditional use. Wells in formations of higher flow rates are normally pumped more frequently, however, and it is to be expected that wells that average approximately 10 barrels or more per day are usually pumped every day.

Periodic shutdowns for other reasons, such as maintenance and mechanical repairs, also might result in no significant loss of production. This is so because after having been interrupted for a short period of time, production is sometimes resumed with a corresponding short period of increased rate of production due to a build-up of reservoir pressure during the period of non-operation. The result, which can normally be verified by an examination of the property's production records, is that the production lost during the time that the well was shut down is, in effect, recouped or "made up" after production is resumed. For example, assuming that total daily production from a three-well property is generally twenty-five barrels of crude oil, including condensates, but that over a two-day period during which one well is shut down for maintenance, total daily production from the property might decline to, perhaps, seventeen barrels. However, after production is again resumed from all three wells, the total production from the property might increase to twenty-nine barrels daily for four days, thus compensating for the production lost during the two days that one well was shut down. In this example, therefore, operation of the property would be considered to be "at the maximum feasible rate of production," and there would be no need for an adjustment to the calculation of average daily production (as in Part II, below) to reflect the time that one well was not operating.

As a general matter, DOE will be guided by the allowable production figures established by state regulatory bodies, where such figures exist, as well as earlier and later production figures for the property concerned in determining whether the maximum feasible rate of production, consistent

with recognized conservation practices, has been maintained.

The second production requirement of § 210.32 is that production not be "significantly curtailed by reason of mechanical failure or other disruption in production." In this regard, DOE recognizes that just as the practicalities of producing crude oil sometimes limit the operation of some wells to less than the maximum possible rate of production, so too do those same practicalities prevent the actual flow of crude oil from every well on the property during every day of the year. Factors such as mechanical failures, which are normally beyond the producer's control, and periodic maintenance result in a nominal amount of "down time" for most properties each year. Accordingly, such normal periods of down time are not considered significant, and no adjustments to the calculation of average daily production need be made to reflect such down time. Where an abnormally large period of down time is experienced on a particular property and production is significantly disrupted or curtailed, however, an adjustment to the calculation of average daily production must be made.

DOE has determined that the use of an absolute rule to establish whether a particular case of curtailed or disrupted production is significant is neither feasible nor equitable. Factors such as the ages of wells, their depths, the types of crude oil being produced, etc., all serve to influence what is properly regarded as a "normal" amount of down time for a particular well. As a guideline, however, DOE will presume that if, for any reason, a well has not operated for a period of more than 24 consecutive hours, production has been significantly curtailed or disrupted and, unless that presumption is overcome, appropriate adjustments must be made in the calculation of average daily production.

The 24 hour presumption is rebuttable in either of two ways. First, the presumption may be overcome upon the showing, by production records or otherwise, that the down time for mechanical failure or maintenance has not been in excess of the historical pattern for a well operating on that

particular property, or (if the information is available) for similar wells operating in the same or nearby fields. Therefore, if due to mechanical failure a well was not operated for 17 days during the measuring calendar year, but the historical pattern for that property has been that the average per-well down time for mechanical failure or maintenance is normally 20 days per year, there has not been a significant curtailment or disruption in production. Overcoming the presumption with respect to curtailment for miscellaneous reasons other than mechanical failure or maintenance will be handled by DOE on a case-by-case basis, since there may be a variety of causes for such curtailments that cannot now be foreseen.

There will undoubtedly be some cases where the production from one or more wells has been curtailed or disrupted for periods longer than the historical pattern would indicate is normal for mechanical failure and maintenance. In this regard (as stated above), DOE recognizes that the mere curtailment or disruption for a short period of time in the actual flow of crude oil from a producing well does not *per se* effect in significant measure a decrease in the average daily production calculated over the period of a calendar year. Accordingly, where the period of time during which production from the well was curtailed or disrupted has been in excess of the normal historical average for mechanical failure and maintenance, the presumption may secondly be overcome upon the showing, by production records or otherwise, that production lost during the abnormally long period of curtailment or disruption was subsequently recouped.

Where the presumption is still not fully overcome, however, failure of one or more wells to satisfy both of the production requirements set forth above means that the stripper well lease exemption cannot be extended to that particular property based on its unadjusted average daily production for the year. This is so because had the property met both production requirements, its average daily production might well have been in excess of

the statutory maximum of 10 barrels per well per day.

It could therefore be argued from a literal reading of the statutory and regulatory language that the DOE should require the total disqualification of any property that has not met both production requirements because it has not operated "at the maximum feasible rate of production and in accord with recognized conservation practices" during the measuring calendar year. The statutory requirement that a property be operated "at the maximum feasible rate of production and in accord with recognized conservation practices" first appeared in section 406(b) of the Trans-Alaska Pipeline Authorization Act of 1973 (Pub. L. 93-153, enacted eleven days prior to the EPAA), which contained an exemption for stripper well leases similar to the one adopted in the EPAA. The Conference Committee included the restrictive provisions "to insure that the exemption is narrowly defined and prudently administered, and to insure that the incentive being granted is properly limited in accord with congressional intent." Moreover, Congress intended that the limiting provisions of the exemption be "strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purposes [e.g., preventing the premature shutdown of stripper wells for economic reasons] is not in any way broadened." The Conferees specifically directed that implementing regulations be "so designed as to provide safeguards against any abuse, overreaching or altering of normal patterns of operations to achieve a benefit under [the exemption] which would not otherwise be available."

Because of this legislative intent, the DOE will not allow curtailments or disruptions in operations beyond normal levels, for whatever reasons, to make the stripper well exemption operative when it would not have applied if operations had been normal. At the same time, however, the DOE believes that it would only defeat the congressional purpose of the stripper well exemption if it also disqualified those properties whose wells would not have exceeded an average of 10 barrels per

day even if operations had been normal. Such a harsh application of the exemption would for no rational reason penalize those producers to whom Congress intended to provide the incentives of the exemption and who would have qualified for the exemption but for operational problems beyond their control.

Accordingly, rather than require the complete disqualification of properties that do not satisfy the production criteria outlined in this Part I, DOE will instead require appropriate adjustments to the computation of average daily production whenever there has been significantly curtailed or disrupted production, so that the calculation more accurately reflects the average daily production of the property when operated at the maximum feasible rate of production.

II. *Adjustments for Significantly Curtailed or Disrupted Production.* Reduced to a mathematical formula, "average daily production" may be expressed as follows:

$$A = Q/D \times W$$

Where:

A = Average daily production of crude oil, including condensates.

Q = Qualified maximum total production of crude oil, including condensates, from the property during the measuring calendar year.

D = Number of days in the measuring calendar year. (Always either 365 or 366.)

W = Number of wells that produced crude oil, including condensates, from the property during the measuring calendar year.

Thus, assuming that Firm X operated property A on which there were four producing wells, which, in the measuring calendar year, produced a total of 14,000 barrels of crude oil, including condensates, and assuming further that all four wells satisfied both production criteria set forth in Part I above, the property's average daily production for that calendar year is properly computed as follows:

$$A = Q/D \times W$$

$$A = 14,000 \text{ barrels} / 365 \text{ days} \times 4 \text{ wells}$$

$$A = 9.59 \text{ barrels per day per well}$$

Therefore, on the basis of its average daily production per well during that

calendar year, property A qualifies as a stripper well lease.

Assume, however, that Firm X operated a second property B, which also produced a total of 14,000 barrels of crude oil, including condensates, from four wells during the measuring calendar year, but that of those four wells, two produced crude oil for the entire year, but two were new wells that did not begin producing crude oil until July 1 of the measuring year. Without any adjustment to the formula to reflect the fact that two of the wells were not producing crude oil for the entire measuring calendar year, the computation of average daily production for property B would yield exactly the same result as the calculation for property A. Yet as discussed in Part I above, an adjustment must be made in calculating property B's average daily production, to reflect the significant "curtailment" or "disruption" in production, i.e., non-production from two wells for six months each. Accordingly, for purposes of the calculation, the two wells that did not produce crude oil until July 1 can be considered only as partial producing wells. Therefore, instead of four producing wells, property B counts two "whole" producing wells and two partial producing wells that must count as one-half well each. Accordingly, the property calculation for property B is as follows:

$$A = Q/D \times W$$

$$A = (14,000 \text{ barrels}/365 \text{ days}) \times (2 \text{ wells} + \frac{1}{2} \text{ well} + \frac{1}{2} \text{ well})$$

$$A = 14,000 \text{ barrels}/365 \text{ days} \times 3 \text{ wells}$$

$$A = 12.79 \text{ barrels per day per well}$$

On the basis of its average daily production during the measuring calendar year, therefore, property B does not qualify as a stripper well lease.

Adjustments to the calculation of average daily production for the period of time during which production from a particular well was significantly curtailed or disrupted are reflected, then, in the denominator of the formula by expressing that well as a fraction equal to the number of days for that well in which production was not significantly curtailed or otherwise disrupted (production days), divided by the number of days in the measuring calendar year. To illustrate:

Property A produced 14,000 barrels of crude oil, including condensates, from 4 wells during the measuring calendar year. While production from two of the wells was not significantly curtailed, production from one well was curtailed for 35 days, and from the other well for 55 days beyond the number of days normally attributed to mechanical failure and maintenance for those wells, and the production normally associated with those wells was not recouped when they resumed operations. In such a case of the calculation of the property's average daily production during the measuring calendar year must be adjusted to reflect the significantly curtailed production from two wells as follows:

One well is counted as:

$$(365 - 35/365) \text{ well} = (330/365) \text{ well}$$

and the other well is counted as:

$$(365 - 55/365) \text{ well} = (310/365) \text{ well}$$

Accordingly, average daily production is computed as follows:

$$A = Q/D \times W$$

$$A = 14,000 \text{ barrels}/[(365 \text{ days} \times 2 \text{ wells}) + (330/365) \text{ well} + (310/365) \text{ well}]$$

$$A = 10.22 \text{ barrels per day per well.}$$

On the basis of its average daily production during the measuring calendar year, therefore, property A does not qualify as a stripper well lease.

III. Multiple Completion Wells.

Where a property encompasses the right to produce crude oil from two or more producing formations or reservoirs, producers sometimes utilize a production technique involving "multiple completion wells." This technique, which makes use of an existing well that produces from one formation, involves drilling from the existing casing separate well-bores or elongating existing well-bores in order to reach other formations. By the installation of additional tubing strings, crude oil may in this manner be produced concurrently from two or more formations. A multiple completion well is to be distinguished from a "recompleted well", which involves the technique of drilling a separate well-bore from an existing casing in order to reach the same reservoir, or redrilling the same well-bore to reach a new reservoir after production from the original reservoir has been abandoned. While a multiple completion well involves the simultaneous production from two or more

reservoirs, a recompleted well involves production from only one formation.

Thus, a multiple completion well is designed to accomplish the same task as two or more separate and distinct producing wells, although conserving initial capital outlay, it functions in many ways as two or more separate producing wells: Crude oil from each formation remains isolated in distinct tubing strings until reaching the surface, where it may either be commingled with crude oil from other formations, or may continue to be diverted separately through alternative chokes and valves in the well-head "Christmas tree" fitting. In this way, differences in API gravity, sulphur content and mineral impurities that might be characteristic of different formations, can be maintained.

Although a multiple completion well is a somewhat less costly alternative to drilling an entirely separate well in order to reach another producing formation in the field, it nevertheless represents a significant capital investment and poses certain additional problems beyond those encountered with single or separate wells. For example, the artificial lift in a multiple completion well is more complicated and, correspondingly more costly to install. Furthermore, repairs to any of the intervals are more costly than in separate wells and can result in a temporary shut-down of production from all reservoirs.

Therefore, the DOE has determined that multiple completion wells may be considered as two (or more) wells for the purpose of calculating "average daily production" pursuant to the stripper well lease exemption of 10 CFR 210.32 if,

(a) The well consists of two (or more) separate tubing strings run inside the casing, each of which carries crude oil from a separate and distinct producing formation, and

(b) The production capabilities of each formation are unaffected by any change in the production level of any other formation producing through the same well.

This result is consistent with the congressional policy of increasing the incentive and economic feasibility of maintaining production of crude oil

from stripper well leases through advanced production techniques.

IV. *Enforcement.* The producer is responsible in the first instance for determining whether production from a particular property is eligible for the stripper well lease exemption; such determinations are and have been, of course, subject to DOE audit. All future determinations as to the exempt status of production from a particular property must take into account the guidelines set forth herein. DOE will afford appropriate consideration to determinations concerning down time for mechanical failure and maintenance that are made by producers, consistent with this ruling, but to the extent that questions are raised with respect to down time that go beyond the scope of the matters discussed in this ruling, producers should contact the DOE for a determination as to whether the 24 hour presumption, discussed in Part I, above, can be overcome.

[40 FR 40828, Sept. 4, 1975]

RULING 1975-13—EARLY PAYMENT PERCENTAGE DISCOUNTS

Facts: On May 15, 1973, Firm A, a refiner, sold gasoline to Firm B and other members of the class of purchaser of which Firm B is a member at a weighted average price of 25 cents per gallon, payable within 30 days of delivery. A discount of 1 percent off the purchase price was extended by Firm A to all purchasers in Firm B's class of purchaser who paid for gasoline within a 10-day period following delivery; payment in full was due within 30 days of delivery.

In the current month, Firm A applies 15 cents per gallon of increased product costs, measured pursuant to the provisions of § 212.83, to determine a lawful selling price for gasoline in this month of 40 cents per gallon to Firm B's class of purchaser. Firm A wishes to change the terms of the early payment discount offered on May 15, 1973, from 1 percent of the purchase price to a fixed amount of 0.25 cents per gallon, or 1 percent of the May 15, 1973 price to the class of purchaser concerned.

Issue #1: May Firm A institute this change in the terms of the discount offered for early payment?

Issue #2: How should Firm A compute its recovery of increased product costs where sales are made to a class of purchaser which has an early payment percentage discount option?

Issue #3: How should Firm B compute its cost of product with respect to purchases made under an early payment percentage discount option?

RULING

Issue #1: Firm A may not change the terms of its early payment discount. On May 15, 1973, Firm A extended the credit option of paying for deliveries within a 10-day period and receiving a 1 percent discount off the purchase price to the members of the class of purchaser to which Firm B belongs, and that option must remain in effect.

Section 210.62(a) provides in part that:

Credit terms other than those associated with seasonal credit programs are included as a part of the May 15, 1973 price charged to a class of purchaser under Part 212 of this chapter. . . . [N]o supplier may require or impose more stringent credit terms or payment schedules on purchasers than those in effect for that class of purchaser during the base period (for seasonal credit), or on May 15, 1973 (for other credit terms).

On May 15, 1973, Firm A had a credit term in effect that provided for payment in full after 30 days and a discount of 1 percent off the purchase price when payment was made within ten days. The amount of the discount and, therefore, the value of the credit term, has always been a function of the total purchase price, with the value of the incentive for prompt payment of a greater or lesser total dollar amount depending upon the dollar amount of the purchase price. Pursuant to § 210.62(a) the credit term must therefore now remain in effect as it existed on May 15, 1973, and it must continue to be offered to all members of the class of purchaser to which it was offered on May 15, 1973. To discontinue the option or to change its terms as described above would be to impose more stringent credit terms than those in effect on May 15, 1973.

While the cost to Firm A of extending a percentage discount obviously increases in proportion to increases in the selling price of the product, the benefit to Firm A of receiving early payment also increases in proportion to increases in the selling price of the product.

Firm A's May 15, 1973 selling price for gasoline to the class of purchaser of which Firm B is a member was 25 cents per gallon. Firm A's current price to that class of purchaser is 40 cents per gallon. If a member of that class of purchaser pays for gasoline within ten days of delivery, Firm A must continue in effect its credit term of a 1 percent discount. This means that the per-gallon payment by Firm B made within 10 days of delivery is 40 cents, minus the early payment discount of 1 percent (0.4 cents), or a total of 39.6 cents.

Issue #2: Firm A should compute its recovery of increased product costs without regard to the amount discounted because of early payment. The amount of increased product costs added to the May 15, 1973 price to Firm B's class of purchaser, 15 cents per gallon, is the amount which is recovered through sale of the product to Firm B, even though Firm B may exercise its option to make payment within 10 days and thereby receive a 1 percent discount off the purchase price.

The discount involved herein does not represent a decrease in the amount received for the product, but rather represents a cost to Firm A of the use of Firm B's money for the 20 or more additional days for which Firm B could otherwise retain the money, before payment in full, based on a stated price per gallon, would be due, 30 days after delivery. Thus, the price to Firm B is 40 cents per gallon with payment required within 30 days. As an inducement to Firm B to make early payment, Firm A has offered a financial incentive. However, this incentive is for the purpose of obtaining payment, and therefore use of the money, 20 days prior to the time it would otherwise be due.

Firm A, assuming that it is able to pass through all of its increased product costs in the form of increased

prices, will have recovered all of its increased product costs whether or not Firm B takes advantage of the early payment discount option. The discount represents a cost of doing business for Firm A (i.e., the interest expense of obtaining the use of Firm B's money), and has no effect on the calculation of the recovery of increased product costs.

Issue #3: Firm B should compute the cost of product purchased based upon the price which it is required to pay 30 days after delivery, without regard to the discount for early payment, provided that the same method shall also be used for purposes of determining the May 15, 1973 cost of product.

In the same way that reduced revenues to Firm A which result from the discount extended to Firm B constitute an interest expense to Firm A, and do not affect Firm A's recovery of increased product costs, the reduced expenses of Firm B which result from the early payment discount do not affect Firm B's calculation of its product costs.

Thus, a price reduction resulting from actual payment made within 10 days represents a non-product financial benefit to Firm B (i.e., the interest received from Firm A for affording Firm A the use of money that could otherwise have been retained by Firm B.) The cost of product to Firm B is therefore 40 cents per gallon, the stated per gallon amount due under the regular payment schedule.

[40 FR 40831, Sept. 4, 1975]

RULING 1975-14—RESELLERS, RESALER-RETAILERS AND RETAILERS: PRICES CHARGED TO REFLECT NON-PRODUCT COST INCREASES

Facts: Firm I, a reseller of residual fuel oil, sold in retail sales 50,000,000 gallons of residual fuel oil during the period April 1, 1974, through March 31, 1975. During that time period, Firm I's non-product costs attributable to its retail sales of residual fuel oil averaged 1.25 cents per gallon, which represented an increase in the level of non-product costs incurred by Firm I in connection with its retail sales of residual fuel oil of .25 cents per gallon since May 15, 1973. In its retail sales of residual fuel oil since April, 1974, Firm I has charged prices reflecting first,

the amount permitted to be charged pursuant to § 212.93(a), which provides that:

(a) A seller may not charge a price for any item subject to this subpart which exceeds the weighted average price at which the item was lawfully priced by the seller in transactions with the class of purchaser concerned on May 15, 1973, plus an amount which reflects on a dollar-for-dollar basis, increased costs of the item,

and, second, an additional .75 cents per gallon. Firm A seeks to justify the charging of an additional .75 cents per gallon under the terms of § 212.93(b), which provides in relevant part:

(b) Notwithstanding the provisions of paragraph (a) of this section:

(3) With respect to residual fuel oil beginning with April 1974: In retail sales, a seller may charge three-fourths cent per gallon in excess of the amount otherwise permitted to be charged for that item pursuant to the provisions of this section, to reflect non-product cost increases which the seller incurred after May 15, 1973. . . .

Issue: May increased prices be charged pursuant to § 212.93(b) that exceed the amount of non-product cost increases incurred by the seller after May 15, 1973?

Ruling: Resellers, reseller-retailers, and retailers cannot charge increased prices pursuant to § 212.93(b) except to the extent that such prices actually "reflect non-product cost increases which the seller incurred after May 15, 1973."

Thus, in the case of Firm I, the prices charged in the one year period beginning April 1, 1974, resulted in overcharges by that firm of 0.5 cents per gallon.

Although the language of § 212.93(b) clearly sets forth the requirement that sellers must have incurred non-product cost increases to avail themselves of the various price increases permitted in sales of certain products by that section, the DOE has not provided any regulations governing the method by which such increased non-product costs are to be computed. This is because the various entities subject to the price rules of Subpart F (Resellers and Retailers) are so numerous and so

diverse as to make such an effort impracticable. Accordingly, the DOE will generally permit such firms to establish their non-product cost increases attributable to their reseller or retailer operations based upon their customary accounting procedures generally accepted and historically and consistently applied by the firm concerned.

The DOE is also aware that many of the hundreds of thousands of small retail firms subject to Subpart F do not have elaborate accounting procedures capable of yielding precise non-product cost figures, and the increments permitted to be added to selling prices to reflect increased non-product costs pursuant to § 212.93(b) were adopted by DOE with a view toward approximating the average actual non-product cost increases being experienced by the various segments of the petroleum industry concerned. For the most part, the DOE believes, based on information submitted in various rule-making proceedings that have been held to consider revising § 212.93(b), that the maximum non-product cost increments set forth in § 212.93(b) generally are representative of the relevant overall non-product cost increases that have been experienced in the industry. Moreover, for products that are in abundant supply, such as gasoline, the forces of competition tend to restrict prices charged to levels that represent the recoupment of actual product and non-product costs, plus the historical margin of profit needed to sustain the business.

Accordingly, the DOE does not anticipate that this ruling will have any widespread effects with respect to the majority of firms subject to Subpart F, even if they might erroneously have regarded the price increments specified by § 212.93(b) as not having to be justified by actual non-product cost increases, since most firms have in fact incurred non-product cost increases equal to, if not more than, those specified in § 212.93(b).

However, in those instances where a firm's increased non-product costs have been substantially less on a per-unit basis than the amount of the per-unit price increases allowable to reflect increased non-product costs pur-

suant to § 212.93(b), DOE will, as stated above, treat as overcharges any prices ostensibly charged pursuant to § 212.93(b) that do not, in fact, reflect actual increased non-product costs. Based on the information available to DOE at this time, the most likely instances in which non-product costs actually incurred may not have been equal to or greater than the amounts set forth in § 212.93(b) are with respect to very large resellers, whose sales volumes result in relatively small per unit non-product costs, compared with the per unit non-product costs of smaller firms.

[40 FR 40833, Sept. 4, 1975]

RULING 1975-15—PROPERTY; DEFINITION FOR PURPOSES OF COMPUTING BASE PRODUCTION CONTROL LEVEL

I. INTRODUCTION

Pursuant to Subpart D of the Mandatory Petroleum Price Regulations, sales of domestic crude oil are subject to the ceiling price rule of 10 CFR 212.73. However, as an incentive to producers to increase current production above 1972 levels, the price regulations permit the sale, without regard to the ceiling price, of the amount of new and released crude oil produced from a particular property in each month. In 10 CFR 212.72, the definitions of "new crude oil" and "released crude oil" provide, in relevant part:

"New crude oil" means, with respect to a specific property, the total number of barrels of domestic crude oil produced and sold in a specific month, less (1) the base production control level for that month, and less (2) the current cumulative deficiency in base production control level crude oil. . . .

"Released crude oil" means that part of the base production control level crude oil for a property in a particular month which is equal to the total number of barrels of new crude oil produced and sold from that property in a specific month. The amount of released crude oil for a property in a particular month shall not exceed the amount of the base production control level crude oil for that property in that month. . . .

Thus, calculations of new and released crude oil are determined by looking to the relationship between current monthly production and the base production control level

("BPCL") for that month, for each particular property. "Based production control level crude oil" is also defined in 10 CFR 212.72:

"Base production control level crude oil" for a particular month for a particular property means:

(1) If crude oil was produced and sold from that property in every month of 1972, the total number of barrels of domestic crude oil produced and sold from that property in the same month of 1972;

(2) If domestic crude oil was not produced and sold from that property in every month of 1972, the total number of barrels of domestic crude oil produced and sold from that property in 1972 divided by 12.

Therefore, the new and released provisions extend generally to those levels of current production in excess of 1972 production levels, and the price regulations establish the concept of "property" as a reference by which a producer is to compare current production levels against those of 1972 to determine the amount of increased production.

The definition of "property," for purposes of determining new and released crude oil, is found at 10 CFR 212.72:

"Property" is the right which arises from a lease or from a fee interest to produce domestic crude oil.

Property is also defined in the context of the stripper well lease exemption in 10 CFR 210.32 as

the right that arises from a lease in existence in 1972 or from a fee interest to produce crude oil in existence in 1972 and is coextensive with the term "property" used in § 212.72 for purposes of determining "base production control level crude oil."

For purposes of the price regulations then, the property concept is one that identifies the right to produce crude oil, whether that right arises from a lease or from a fee interest. While the DOE recognizes that various state and other federal regulatory authorities may, for other purposes, have monitored production levels on other bases (e.g., by physical boundaries or by producing formations or reservoirs), it is necessary that the price regulations embody a uniform concept, the parameters of which can be readily applied to all domestic production, regardless of varying state classifications. For

this reason, DOE regulations utilize, as a reference, a property concept, based upon the right to produce crude oil, that can be readily identified for all producers.

Accordingly, in applying the provisions of Subpart D regarding new and released crude oil, a producer must look to the limits of the right to produce crude oil in defining a particular property. Since the production of crude oil is anticipated to be an ongoing operation, normally there will have been no changes in ownership or restructuring of the right to produce crude oil since before 1972. This ruling is addressed to those cases where, due to such a change or restructuring since 1972, an interpretation of the definition of "property" is required for proper application of the price rules in determining BPCL.

Because of the need to quantify the 1972 monthly production levels for a particular property in order to calculate that property's base production control level for each month, the producer must refer to the right to produce crude oil as it existed in 1972 in order to define the property involved. This is dictated, of course, by the need to compare like quantities, today and in 1972, in order to ensure a meaningful application of the new and released provisions. In the majority of cases, involving only one lease that remains unchanged since 1972, a producer will simply compare his current monthly production for the property (the lease in those cases) against the corresponding monthly production for the lease in 1972.

II. EXAMPLES

A. Pre-1972 Unitization. A property that was unitized prior to 1972 requires the same treatment as a single property that has been unchanged since 1972. Often, where two or more leases have reached the declining stages of production, they are unitized (i.e., the operations of the several leases are combined, more efficiently to undertake enhanced recovery techniques.) Such techniques usually involve the conversion of some previously producing wells to injection wells and/or the shutting-in of other wells

in a coordinated overall-production effort, and for this reason some leases are left after unitization with fewer producing wells within their geographical boundaries than before. Unitization sometimes results in one or more leases being left only with injection wells, or with no operating wells at all. Because this realignment of producing patterns, then, may result in the distorted *actual* production from any one lease comprising the unit, production from the unit is allocated to each lease based upon *imputed* production percentages. Accordingly, the agreement under which the several leases are unitized typically combines the several rights to produce crude oil that, prior to unitization, existed in the previous producers into a single right to produce crude oil now existing in the unit. Generally, therefore, since the unit agreement signifies one right to produce crude oil arising from several leases or fee interests, the unit defines the property.

Accordingly, for purposes of determining new and released crude oil, the current total monthly production from a unitized property must be compared with limits of the corresponding right (or rights) to produce crude oil that existed in 1972. Therefore, in cases of pre-1972 unitizations, the total current monthly production from the unit must be compared with the corresponding 1972 total monthly production from the unit. This will avoid the anomalies that are likely to result from attempting to compare current actual or imputed monthly production for each lease within the unit with actual or imputed monthly production for individual leases in 1972.

B. Post-1972 Unitization. In the case of a property that was unitized after calendar year 1972, the need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit. Accordingly, for example, where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise

the unit. Under no circumstances, therefore, would a post-1972 unitization create a "new" property, i.e., one that has no BPCL.

Example 1: In 1973, seven leases were unitized. For each lease, the March 1972 production was as follows:

- A—500 barrels
- B—750 barrels
- C—350 barrels
- D—800 barrels
- E—400 barrels
- F—1000 barrels
- G—200 barrels

Production from the unit in March 1975 was 4300 barrels. Totaling the March 1972 production levels of each lease yields a BPCL of 4000 barrels. Accordingly, since the March 1975 production from the unit exceeded the property's BPCL by 300 barrels, and assuming there is no current cumulative deficiency in BPCL for any of the leases or for the unit, 300 barrels of new and 300 barrels of released crude oil may be sold by the producer without regard to the ceiling price rule.

C. Unitization During 1972. In those cases where a property was unitized during 1972, comparison of like quantities requires a two-stage computation of BPCL to be done with reference to 1972 production levels. For that portion of calendar year 1972 before unitization, the BPCL is equal to the total production from all of the several leases that now comprise the unit; for the remaining portion of calendar year 1972 after unitization, the BPCL is equal to the total production from the unit.

Example 2: Assume that the seven leases in Example 1 were unitized on April 1, 1972, and that the production figures shown in Example 1 represent the production levels for each lease in January, February, and March of that year. Thereafter the unit produced crude oil at the rate of 4000 barrels in April and May, at the rate of 4100 barrels in June, July and August, and at the rate of 4150 barrels in September, October, November and December.

For each of the months of January through March, the BPCL is 4000 barrels (i.e., the total production of all leases comprising the unit). For the months after April 1, the BPCL is equal to the total production of the unit, i.e., 4000 barrels in the months of April and May, 4100 barrels in the months of June, July, and August, and 4150 barrels in the months of September, October, November and December.

In sum, in determining the BPCL for a particular property, the producer must look to the property as it existed in 1972 in order to establish the appropriate production levels.

D. Post-1972 Subdivision. Just as a post-1972 unitization does not establish a new property, neither does the subdivision after 1972 (through assignment, creation of new leases, or otherwise) of a single right to produce crude oil into several rights to produce crude oil establish a new property for purposes of measuring the BPCL and determining whether any new or released crude oil has been produced.

Example 3: A is a firm that produced crude oil from a 650 acre lease in 1972. The lease established in A a single right (assignable in whole or in part) to produce crude oil from the entire 650 acres. In 1974, A assigned 100 acres to B, who drilled for and began producing crude oil. During 1972, there were no producing wells on the 100 acres assigned from A to B.

The production from B's lease is not necessarily classified as new crude oil.

The fact that during 1972 there were no producing wells within the geographical boundaries of the lease now operated by B does not establish, *per se*, that all of B's production will qualify as new oil. Only when the total current production from the entire 650 acres is measured against the 1972 production from the comparable area can a determination be made as to the existence of new and released crude oil.

The result reached in Example 3 is consistent with the policy that underlies the two-tier pricing system. For if instead of assigning a portion of the original lease to B, A developed that portion of the lease himself, the production of new oil would occur only if production from the entire property exceeded 1972 levels for the entire 650 acres. That is, where A's property consisted of a single right to produce crude oil from a 650 acre lease, the drilling of a new well located upon a previously undeveloped portion of the lease would not automatically establish new crude oil. Under no circumstances does the mere drilling of a new well automatically establish the production as new crude oil. Production from a property qualifies as new crude oil only if in excess of the property's 1972 production levels and any current cumulative deficiency. The result in the example above is no different

merely because A has assigned to B the right to produce crude oil from a portion of the lease. Obviously, neither would B's acquisition from A of the right to produce crude oil from the entire 650 acres establish a new property, resulting in the production of all new oil. Rather, the BPCL for B's property in that case would be equal to the 1972 production levels from the property described by A's right to produce crude oil in 1972. A's transfer of less than the entire property does not yield a different result.

E. Subdivision During 1972. Cases where a property was subdivided during 1972 are governed by a rule similar to that described in Example 2 for unitization during 1972. The BPCL during the first portion of the year (i.e., before the subdivision) is equal to the monthly production in 1972 from the entire lease; during the second portion of the year (i.e., after the month in which the subdivision occurred), the BPCL is equal to the two leases.

Example 4: A is a firm that produced crude oil from a 650 acre lease since 1969. In the first portion of 1972, the property's production levels were as follows:

January—400 barrels
February—450 barrels
March—450 barrels
April—500 barrels

On May 1, A transferred 250 acres to B. During 1972, there were no producing wells on the 250 acres transferred from A to B. The corresponding production levels for the balance of 1972 were as follows:

	Lease A (barrels)	Lease B (barrels)
May	500	0
June	400	50
July	450	100
August	500	150
September	500	200
October	550	200
November	500	200
December	450	200

Accordingly, for the months from January through April, the BPCL is equal to the production from the entire 650 acres (A's lease), i.e., 400 barrels for the month of January, 450 barrels for the months of February and March, and 500 barrels for the month of April. For the months of May through December, the BPCL is still equal

to the total production from the entire 650 acres (now A's lease plus B's lease), i.e., 500 barrels for the month of May, 450 barrels for the month of June, 550 barrels for the month of July, 650 barrels for the month of August, 700 barrels for the month of September, 750 barrels for the month of October, 700 barrels for the month of November, and 650 barrels for the month of December.

For any current month, the production from A's lease plus the production from B's lease must exceed the BPCL and any cumulative deficiency before any crude oil may be sold without regard to the ceiling price rule.

In cases where a property has been subdivided during or since 1972, the current producers must show that the accumulated total current production from the present leases is in excess of the 1972 production levels for the property as it existed in 1972 plus any current cumulative deficiency in order to establish new and released crude oil. Where the producers have determined that based upon the proper application of the new and released provisions as interpreted in this Ruling, a specific amount of current production qualifies as new and released, they may allocate such new and released crude oil among themselves in whatever proportions they may agree upon. If they are unable to agree, they may petition the DOE pursuant to Subpart G of Part 205 for a resolution.

F. Production From More Than One Reservoir on a Single Property. Because the property concept is based upon the right to produce crude oil, whether arising from a lease or from a fee interest, the existence of two or more separate and distinct reservoirs will not in itself create two or more separate "properties". Therefore, for purposes of determining BPCL, where a producer holds a single right to produce crude oil from two or more reservoirs, together the two or more reservoirs constitute a single property; where there are separate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property.

Example 5: O is the fee owner of a 650 acre parcel of land. In 1969, O executes a lease granting A the exclusive right to produce crude oil from the entire 650 acres. In 1972, A was producing crude oil from a reservoir at the level of 2,000 feet. A reservoir at the level of 3,000 feet had not at that

time ever produced crude oil. In 1975, A drills a well and begins to produce crude oil from a separate reservoir at the level of 3,000 feet.

Since A holds the right to produce crude oil from all levels, the property consists of the entire 650 acres including both reservoirs. Production does not qualify as new unless the total amount of monthly production from both reservoirs is in excess of 1972 levels and any current cumulative deficiency from the entire 650 acres.

[40 FR 40832, Sept. 4, 1975]

RULING 1975-16—RESELLERS, RESELLER-RETAILERS AND RETAILERS; CARRY-FORWARD OF THE AMOUNT BY WHICH PRICES CHARGED ARE LESS THAN THE PRICE INCREASES PERMITTED TO REFLECT INCREASED NON-PRODUCT COSTS

Facts: Firm X, a retailer of gasoline, computed its maximum lawful price for gasoline on June 1, 1975, following a delivery of gasoline on that date, which resulted in a new, higher weighted average unit cost of gasoline in inventory, pursuant to 10 CFR 212.93 as follows:

(1) The weighted average price at which gasoline was lawfully priced by the seller in transactions with the class of purchaser concerned on May 15, 1973: 37.2 cents per gallon; plus

(2) Increased costs (as defined in § 212.92, based on a weighted average unit cost of product in inventory on May 15, 1973, of 30.2 cents per gallon, and a current weighted average unit cost of product in inventory of 42.5 cents per gallon): 12.3 cents per gallon; plus

(3) The amount permitted to be charged pursuant to § 212.93(b) to reflect non-product cost increases which the seller incurred after May 15, 1973: 3.0 cents per gallon; for a total of 52.5 cents per gallon.

Based on this computation, Firm X on June 1, increases its selling price for gasoline to 51.5 cents per gallon.

On June 15, 1975, Firm X receives a delivery of gasoline at 43.5 cents per gallon, and, as a result the weighted average unit cost of gasoline in inventory of Firm X is increased to 43.0 cents per gallon. Since Firm X has already increased its price once in June, to reflect increased costs, it may not again increase its prices until July.

Issue: What portion, if any, of the amount by which Firm X's price is less

than the maximum lawful price can Firm X carry forward from June, for recovery in prices charged in a subsequent month?

Ruling: Pursuant to § 212.93(e), Firm X is permitted to carry forward unrecovered "increased costs," as defined in § 212.92 (i.e., unrecovered increased product costs), for recovery in a subsequent month. The regulations do not include a corresponding provision for the carry forward of amounts by which prices charged do not take full advantage of the authorization in § 212.93(b) to charge prices in excess of those otherwise permitted, to reflect increased nonproduct costs. Section 212.93(b) therefore simply affords a seller a continuing opportunity to recover increased non-product costs up to a specified price increment per unit of sales, but does not entail any authority to carry forward for use in determining prices in subsequent months the amount by which prices charged are less than the price increment permitted by that section.

In order to implement this distinction in treatment between increased product costs and price increments to reflect increased non-product costs, prices are regarded as being constituted of three elements, in the sequence in which those elements are set forth in the regulations; i.e., first, the May 15, 1973 price; second, the increased product cost; and, third, increased non-product costs. Accordingly, as a general rule, only where a price charged is less than the price based on the first two elements (May 15, 1973 price plus increased product costs), and exclusive of any price increase pursuant to § 212.93(b), which affords the opportunity to pass through increased non-product costs, will there be any unrecovered increased product costs available for carry forward under § 212.93(e).

An exception to this general rule is afforded, however, in recognition of the fact that sellers may incur product cost increases but be unable to increase prices because of previous price adjustments in that month, or may otherwise not find it practicable to adjust prices each time they receive a delivery of product which results in a change in their weighted average unit

cost of product in inventory. In such cases, a seller will be permitted to treat the prices charged during the entire period between its price adjustment as including the same increment of non-product cost recovery as was included when that price was initially adjusted.

Thus, in the case of Firm X, its price on June 1, 1975 represented a May 15, 1973 price of 37.2 cents per gallon, increased product costs of 12.3 cents per gallon, and increased non-product costs of 2 cents per gallon. Then, when the amount of its increased product costs changed on June 15, from 12.3 cents per gallon to 12.8 cents per gallon, the price charged continued to represent a 2 cent per gallon recovery of increased non-product costs. Thus, notwithstanding the fact that Firm X, beginning June 15, had increased product costs of 12.8 cents per gallon, the 51.5 cent price being charged continues to represent a May 15, 1973 price of 37.2 cents, increased product costs of 12.3 cents, and increased non-product costs of 2 cents. The 0.5 cent per gallon increase in product costs that is not recovered in sales beginning on June 15 and continuing until Firm X makes its next price adjustment may therefore be carried forward pursuant to § 212.93(e) for recovery in a subsequent month. However, when Firm X computes its maximum prices for purposes of its next price adjustment, the price that is established will again be deemed to include all available increased product costs before the additional price increases permitted pursuant to § 212.93(b) to reflect increased non-product costs will be deemed to have been charged.

This ruling only addresses the maximum level to which prices may be increased pursuant to § 212.93(b) "to reflect" increased non-product costs. Questions relating to the extent to which actual non-product cost increases must be incurred to take advantage of § 212.93(b) price increases are discussed in Ruling 1975-14. It should be noted in that regard, however, that there is no requirement that increased non-product costs be passed through pursuant to § 212.93(b) in the same month they are incurred.

[40 FR 40834, Sept. 4, 1975]

RULING 1975-17—MANDATORY PETROLEUM PRICE AND ALLOCATION REGULATIONS; APPLICATION DURING SEPTEMBER 1975

The expiration of the Emergency Petroleum Allocation Act of 1973 ("EPAA of 1973") on August 31, 1975 and the subsequent extension of that law by adoption of the Emergency Petroleum Allocation Act of 1975 ("EPAA of 1975"), which was signed by the President and became law on September 29, 1975, have raised a number of questions regarding the application of the DOE's regulations to transactions that occurred during the hiatus period of September 1 to September 29. The purpose of this Ruling is to give notice of the manner in which the DOE regulations apply to transactions that occurred during that period.

I. Background.

S. 1849, which would have simply changed the expiration date in section 4(g)(1) of the EPAA of 1973 from August 31, 1975 to February 28, 1976, was passed by Congress on July 31, 1975. The President vetoed S. 1849 on September 9, 1975, and the veto was sustained by the Senate the following day.

Although S. 1849 passed the Congress a month prior to the scheduled expiration of the EPAA of 1973, it was contemplated at the time of its passage that the bill might not be sent to the President until late August, that the President was likely to veto it, and that it would become law only if Congress overrode the veto—which would occur at the earliest a few days after the August 31, 1975 expiration date. Thus, in the floor debate on S. 1849, several key proponents of the bill in the House made it clear that:

It is the intent of the Congress that the extension of the allocation act included in S. 1849 take effect immediately and retroactively in the event of a veto and an override of that veto, and that there be no hiatus or gap during which violations of these regulations would not be subject to civil sanctions. 121 Cong. Rec. H 7955 (daily ed., July 31, 1975) (remarks of Cong. Dingell). See also *id.* at H 7956-57.

During the month of August it became apparent that the President would indeed veto S. 1849 because he

believed the six-month extension provided for therein would unnecessarily delay the resolution of the difficult energy issues confronting the Nation. However, on August 29, 1975, the President informed the Majority Leader of the Senate and the Speaker of the House that he would be willing to sign a short-term (approximately 30 to 45 day) extension of the Act if he received assurances that during the extension period the Congress would act to adopt a phased decontrol program. On that date DOE Administrator Frank G. Zarb issued a public statement, widely reported in the press, that:

A short-term extension, if signed by the President, would be applied retroactively. Since the Congress does not return until September 2, there would be a short gap in the Allocation Act authority between the August 31 expiration of current authority and any possible Congressional action on the short extension. It is likely, however that the Congress will intend no regulatory gap and will intend to reinstate automatically the price and allocation regulations in effect on August 31 with the passage of any short extension.

DOE, in consultation with the Department of Justice, has reviewed the legal effects of such a gap, and concluded that by an extension the Congress can revive the current controls retroactively to September 1. If the President signs such a short extension, appropriate regulatory action can then be taken to correct any transactions in violation of DOE's current controls that occurred during the gap.

There was substantial commentary in the trade press and elsewhere to the effect that the reinstitution of controls would, and could legally, apply retroactively to September 1. For example, the September 12 edition of the *Oil Daily* commented that:

All this points to the wisdom that oil companies must still act as if controls were in place unless there is more assurance that decontrol will stick. Any action taken outside of the mandates of the defunct EPAA might be subject to expensive adjustments when Congress makes up its mind on the issue of oil company regulation.

On September 11, 1975, the day following the Senate's vote to sustain the veto of S. 1849, the House unanimously passed H.R. 9524, which would have extended the EPAA of 1973 for 60 ad-

ditional days after September 1. The bill passed the Senate with certain amendments, including an expiration date of November 15, 1975 on September 26, 1975. The House concurred in the Senate amendments on the same day, and the EPAA of 1975 was signed into law by the President on September 29, 1975.

The EPAA of 1975 expressly states that the DOE regulations in effect on August 31, 1975 are to be considered reinstituted in full force and effect retroactive to that date:

Sec. 3. It is the intent of the Congress that the regulations promulgated under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act.

In the floor debate on this amendment, Representative Staggers, the Chairman of the House Committee on Interstate and Foreign Commerce, stated:

It is the intent of both bodies of the Congress that the pricing and allocation controls contained in Department of Energy regulations which were promulgated under the act continue in effect as though there has been no hiatus. Both the administration and leaders of the Congress have repeatedly stated that any extension of the Allocation Act finally agreed to would be retroactive in character. The industry has had ample notice of this matter.

Accordingly the Department of Energy is called upon to enforce their regulations as if they had remained in full effect in the period it has taken for the Congress and the President to agree upon the terms of an extension of the act. In this regard the DOE will be expected to order a rollback and refunding of any price increases which may have occurred on or after September 1 and take other appropriate action to assure the continuity and integrity of the distribution system for petroleum products. 121 Cong. Rec. H. 9193 (daily ed., September 26, 1975).

Similarly, Senator Jackson, Chairman of the Senate Interior Committee, stated in connection with H.R. 9524, as amended, that "the extension restores petroleum price controls, on a retroactive basis to September 1, until November 15, 1975." 121 Cong. Rec. S16866 (daily ed., September 26, 1976).

Judicial precedent supports the DOE's and the Congress' determination that the enactment of the EPAA of 1975 can lawfully reinstate the

DOE's Mandatory Petroleum Allocation and Price Regulations as though they were continuously in force during the hiatus period, particularly where there was, as in this case, a clear expression of Congress' intention in this regard and extensive notice to the public that the EPAA of 1973 would be extended on a retroactive basis. (See *Porter v. Senderowitz*, 158 F.2d 435 (3rd Cir. 1946), cert. denied, 330 U.S. 848 (1947); *Porter v. Shibe*, 158 F.2d 68 (10th Cir. 1946); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974); *First National Bank v. United States*, 420 F.2d 725 (Ct. Cl.), cert. denied, 398 U.S. 950 (1970).

II. Guidelines for Determining Compliance with the DOE Regulations.

A. *Civil Remedies.* Since the EPAA of 1975 reinstitutes the DOE Mandatory Petroleum Allocation and Price Regulations (Parts 210, 211, and 212, Chapter II of Title 10, Code of Federal Regulations) in effect on August 31, 1975 retroactive to that date, as stated above, DOE will apply its allocation and price regulations as though they had been in effect continuously since August 31, 1975. Persons subject to the regulations should carry out September transactions as though the EPAA of 1975 had been enacted prior to September 1, 1975.

This means, at a minimum, that any supplier/purchaser relationships terminated during the hiatus contrary to the regulations must be immediately reestablished and that that portion of prices charged during the hiatus in excess of amounts permitted by the regulations must immediately be refunded or rolled back. It is recognized, however, that in other types of cases, particularly in the allocation area, there may be some practical difficulties in retroactively implementing measures that will result in strict adherence to all other regulations during hiatus period. Thus, whether the DOE will require that steps other than reestablishing supplier/purchaser relationships and refunding overcharges be taken to remedy violations of the regulations during the hiatus will be determined on a case-by-case basis, depending upon the practical difficulties in doing so, the extent of injury already incurred by any person and the

degree to which further remedy would amount to a penalty on any person.

Corrective actions to conform transactions during the hiatus to the regulations should be voluntarily undertaken by the firms involved as soon as possible. For example, supplier/purchaser relationships that were terminated during the hiatus period contrary to the regulations in effect on August 31 should be reestablished promptly. Prices charged in excess of amounts permitted by the regulations in effect on August 31 should be refunded where the overcharged customers are identifiable and, with respect to unidentifiable customers, should be "rolled back" through a reduction in the *current* (as opposed to the maximum lawful) selling price until the full amount of the overcharge is returned to the marketplace. To insure that proper credit is given by the DOE for the rollback or refund of prices charged during the hiatus period, firms are advised to keep detailed records of any corrective action taken and to advise the DOE of questions concerning the form of remedy that will be acceptable to the DOE should seek guidance from the DOE as soon as possible.

The DOE will audit transactions that occurred during the hiatus period in the normal course of its compliance program. To the extent that violations are found not to have been remedied, the DOE, as part of its normal compliance efforts, intends to issue remedial orders and take such other action as is authorized by regulations to secure compliance with the regulations and to remedy violations that occurred during the hiatus.

B. Civil and Criminal Penalties. The *ex post facto* clause of the U.S. Constitution limits the authority of Congress to apply a criminal statute retroactively. Therefore, it is the DOE's intention not to seek criminal penalties for willful violations of DOE regulations that occurred during the hiatus period.

It is less certain that the *ex post facto* clause applies to a statute that imposes civil penalties, as does the EPAA of 1973, as amended by the EPAA of 1975, although due process considerations of course remain applicable. Therefore, while as a general

rule the DOE will not seek civil penalties for violations that occurred during the hiatus period, it expressly reserves the right to do so if the factual circumstances of a particular case appear to warrant such action.

Finally, while the DOE's authority to seek civil or criminal penalties for violations that occurred during the hiatus may be limited, the DOE does not consider such limitations to apply to violations of lawful orders issued after the hiatus period to remedy violations that occurred during the hiatus. As noted above, the DOE intends to issue orders after the hiatus period to remedy violations that occurred during the hiatus. Notwithstanding the DOE's general intent not to seek civil or criminal penalties for violations of the regulations during the hiatus period, a firm that willfully refuses to comply with a remedial or other order issued by the DOE to remedy a violation that occurred during the hiatus period will be fully subject to the civil and criminal penalties provided for in Section 5(a) of the EPAA of 1973 and Section 208 of the Economic Stabilization Act.

III. Compliance with Price Regulations, Illustrative Examples.

The following examples illustrate how the DOE's Mandatory Petroleum Price Regulations will be applied to transactions that occurred during the period September 1 to September 29, 1975.

Example 1 (Producers): On September 2, 1975, Firm A, a producer of crude oil, sold 100 barrels of crude oil to Firm B, a refiner. Of the 100 barrels, 60 barrels were old crude oil subject to the ceiling price rule contained in § 212.73 of the regulations, and 40 barrels were new and released crude oil pursuant to § 212.74 of the regulations. Payment was made September 17, 1975 for all 100 barrels at the free market prices for new and released crude oil.

Firm A is required to present to Firm B a revised invoice that correctly states the volumes of old, new, and released oil sold on September 2, 1975 and specifies that payment for 60 barrels is to be made at or below the ceiling price for old crude oil, in accordance with § 212.73, and that payment

for 40 barrels is to be made at the September 2, 1975 posted or free market price for new and released crude oil, in accordance with § 212.74, and with Ruling 1974-11, "New" and "Released" Crude Oil (Current Free Market Price Under § 212.74). Amounts paid by Firm B in excess of the corrected prices shall be refunded.

Example 2 (Refiners): Firm B, a refiner, entered into the above transaction. For purposes of §§ 212.82 and 212.83, in computing prices for October, Firm B's cost of crude oil for the month of measurement September must be computed according to the corrected invoices presented by Firm A. Prices charged by Firm B in October in excess of amounts permitted by the regulations (including amounts carried forward from previous months and available in accordance with § 212.83(e)) shall be refunded to identifiable customers and, to the extent its customers cannot be identified, shall be "rolled back" in the form of reductions from current (as opposed to maximum lawful) selling prices.

Example 3 (Refiners): Firm B, a refiner, anticipating increased costs of crude oil purchased during September, began on September 1 to charge prices for refined petroleum products based on September costs of crude oil at free market price levels. In applying the formulae in § 212.83 to compute prices for September, Firm B's cost of crude oil must be computed from costs for crude oil purchased or landed in August, the month of measurement, and may not include the cost of crude oil purchased or landed in September. Prices charged by Firm B in September in excess of maximum lawful prices permitted by §§ 212.82 and 212.83 of the regulations (including amounts carried forward from previous months and available in accordance with § 212.83(e)) shall be refunded to identifiable customers and to, the extent its customers cannot be identified, shall be "rolled back" in the form of reductions from current (as opposed to maximum lawful) selling prices.

Example 4 (Resellers): Firm C, a reseller, purchased refined products from Firm B in the circumstances of Example 2 and received a refund of

overcharges in September by Firm B. Firm C is required to recalculate its product costs in the month of September to reflect the refund and to make appropriate refunds or rollbacks to its customers to the extent that the recalculation has resulted in its own prices having been in excess of prices permitted by the regulations. That is, Firm C is similarly required to make appropriate refunds or rollbacks of prices charged in September in excess of amounts permitted by §§ 212.92 and 212.93 of the regulations (including amounts carried forward from previous months in accordance with § 212.93(e) and available in accordance with § 212.93(g)).

Example 5 (Leases): Firm E, a refiner, is the lessor of real property used by Firm F in retailing gasoline. On September 2, 1975, Firm E notified Firm F of its intent to exercise the lease termination clause of their contract because of Firm F's failure to convert to a 24-hour per day operation. Firm F did not operate 24 hours per day at any previous time.

Firm E's notice violates § 212.103(c) of the regulations and is therefore void.

Example 6 (Leases): Firm E, a refiner, is the lessor of real property used by Firm G in retailing gasoline. On September 2, 1975, Firm E notified Firm G of its intent to exercise a lease clause permitting it to increase the rent up to 50%.

Firm E's notice is void, but Firm G is entitled to a refund of any rent already paid by it in excess of the amounts provided for in § 212.103(a) of the regulations.

IV. Compliance with Allocation Regulations, Illustrative Examples.

The following examples and discussion illustrate how the DOE's Mandatory Petroleum Allocation Regulations will be applied with regard to the September 1-29 hiatus period.

Example 7 (Supplier/wholesale purchaser relationships): Supplier H is the base period supplier of middle distillates to Firm J, a wholesale purchaser-reseller, and Firm K, a wholesale purchaser-consumer. On September 1, 1975, Supplier H notified Firms J and K that it would no longer supply them.

Supplier H must continue to supply Firm J since under § 211.9(a)(2)(i), supplier/wholesale purchaser-reseller relationships are fixed for the duration of the allocation program and may not be modified or terminated without DOE approval.

Supplier H must also continue to supply Firm K since supplier/wholesale purchaser-consumer relationships are also established for the duration of the program, as provided in § 211.9(a)(2)(ii), unless the parties have given their mutual consent to the termination of the supplier/purchaser relationship. Only if Supplier H and Firm K had so consented and could establish that their consent was in fact mutual and voluntary, would their supplier/purchaser relationship be considered terminated.

Example 8 (New supplier/wholesale purchaser relationships): During September, 1975, Supplier H entered into a contract to supply middle distillates to Firm L, a wholesale purchaser-reseller, and also agreed to supply Firms M and N, both wholesale purchaser-consumers. On September 1, 1975, Firm M and its base period supplier had mutually consented to terminate their supplier/purchaser relationship. Firm N had been notified that its base period supplier no longer intended to supply it.

The supply contract between Supplier H and Firm L does not establish a valid supplier/wholesale purchaser-reseller relationship because DOE approval has not been obtained as required by § 211.12(e)(2)(ii). Unless Firm L is without a base period supplier or a new supplier as provided in § 211.10(e)(1), it may not even apply to DOE for assignment of Supplier H as its base period supplier.

The supply arrangement between Supplier H and Firm M may continue as a mutual arrangement as contemplated by § 211.12(e)(1). This new supplier/purchaser relationship is subject to the notice and approval provisions of § 211.12(e)(1) (ii) and (iii).

In the case of Firm N, however, the new relationship between it and Supplier H is not valid unless Firm N now arranges by mutual consent to terminate its supplier/purchaser relationship with its base period supplier,

which unilaterally refused to supply it during September. If that termination is effected, Firm N is considered to have been without a base period supplier and is therefore able to enter into a mutual supply arrangement with Supplier H as provided by § 211.12(e)(1). In this event, the notice and approval provisions of § 211.12(e)(1) (ii) and (iii) apply.

Supplier H may, of course, supply purchasers with which it has no supplier/purchaser relationship to the extent that it has surplus product and has complied with the provisions of § 211.10(g).

Example 9 (Crude oil supplier/purchaser rule): On September 1, 1975 Firm O, a crude oil producer, contracted for the sale of its production to Firm P, to whom Firm O had never previously sold. Prior to September 1, 1975, Firm O had sold its production to Firm Q, which had purchased Firm O's production under a supplier/purchaser relationship in effect pursuant to § 211.63(a). Firm Q did not consent to the termination of its supplier/purchaser relationship with Firm O. Therefore, Firm Q continues to be entitled to purchase Producer O's production for the month of September 1975 and thereafter, except as to September 1975 production where the sale and delivery thereof to Firm Q is no longer feasible because it is no longer within Firm O's possession or control as of the date this ruling is published in the FEDERAL REGISTER. Crude oil which Firm O is otherwise contractually required to supply to Firm P but is still in Firm O's possession or control as of such publication date shall be delivered to Firm Q. This result would be identical if a broker or reseller, instead of Firm O were the supplier to Firm Q.

In general, pursuant to the crude oil supplier/purchaser rule set forth in 10 CFR 211.63, all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973 are required to remain in effect for the duration of the Mandatory Allocation Program. In accordance with the provisions of the EPAA of 1975, as a general rule, all crude oil supplier/purchaser relationships in effect

under § 211.63 immediately prior to the period September 1 to 29, 1975 are required to be maintained in effect under § 211.63 for the period subsequent to August 31, 1975 during which the EPAA of 1973, as amended, is in effect.

If a valid termination under § 211.63 of Firm Q's supplier/purchaser relationship had been effected as of September 1, 1975, Firm O would no longer be required to sell its crude oil to Firm Q. Supplier/purchaser relationships required to be maintained under § 211.63 may be terminated by mutual consent of both parties and, as to new and released crude oil, may be terminated where the present purchaser of the crude oil refuses, after notice by the seller, to meet any bona fide offer for the crude oil by another purchaser at a higher lawful price. As to terminations by mutual consent, DOE has consistently ruled that any consent to such a termination must be made affirmatively in writing in light of the provisions of § 211.63. Accordingly, supplier/purchaser relationships in effect on August 31, 1975 may be terminated in the period September 1 to September 29, 1975 in the manner prescribed in § 211.63. No termination in this period is valid under § 211.63 unless effected in accordance with the provisions of that section.

Example 10 (Old oil allocation program): From September 1 to September 28, 1975 Firm R, a crude oil producer, sold its production to Firm S, a refiner. Firm R's entire production is classified as old crude oil under § 212.72 and therefore constitutes old oil (as defined in § 211.62) for purposes of the old oil allocation program set forth in § 211.67. All of such sales were made at a price in excess of the lawful ceiling price as computed under § 212.73.

Firm S must include the crude oil purchased from Firm R its crude oil receipts (in accordance with the provisions of § 211.62) and must report these particular receipts as old oil for purposes of § 211.66 and § 211.67, in accordance with the certification under § 212.131 received by Firm S from Firm R, regardless of the fact that Firm S may have paid an exempt price for the crude oil. Firm S's

remedy in this case is to seek a refund from Firm R (under the procedures set forth in Example 1 above) for these sales made at a price in excess of the lawful ceiling price.

[40 FR 48341, Oct. 15, 1975]

RULING 1975-18—NATURAL GAS SHRINKAGE; COMPUTATION OF INCREASED COST

This Ruling is issued to provide guidance to gas processors with respect to acceptable methods for computation of increased cost of natural gas shrinkage under Subpart E of the Mandatory Petroleum Price Regulations in Part 212 of the DOE regulations for the period prior to January 1, 1975, and under Subpart K of Part 212 for the period on and after January 1, 1975. Gas processors process natural gas to recover natural gas liquid products covered by DOE regulations (propane, butane and natural gasoline) and, in some instances, a product that is exempt from DOE regulation (ethane). Some gas processors process natural gas only to recover the undifferentiated stream of natural gas liquids, which is a liquid made up of the foregoing products, but in mixed form. Such mixed streams of natural gas liquids may be further processed to segregate the individual component natural gas liquid products.

Gas processing firms are included within the definition of "refiner" in § 212.31 and, prior to January 1, 1975, were subject to the refiner's price regulations in Subpart E of Part 212. Pursuant to the price rules of Subpart E, refiners were permitted to pass through their increased product costs, including the increased costs of natural gas shrinkage, in prices charged for covered products (DOE Ruling 1975-6).

Effective January 1, 1975, the price regulations were amended by adding a new Subpart K to Part 212 to provide price rules tailored more specifically to the operations of gas processors. The price rules of Subpart K continue to permit gas processors to pass through their increased costs of natural gas shrinkage as increased product costs. The principles and procedures set forth in this Ruling provide guidelines as to the appropriate methods

for determining the increased costs of natural gas shrinkage for both the period prior to and the period beginning on January 1, 1975.

FACTS

Firm A. Firm A, a gas processor, purchases "wet" natural gas (i.e., natural gas from which the liquids, other than condensate, have not been extracted) under a "net-black" contract with Firm X. Title to the "wet" natural gas passes to Firm A at the wellhead, and Firm A transports the gas to its gas plant. Both the natural gas liquid products which are extracted from the natural gas and fractionated at the same facility and the residue gas which remains after the liquids have been extracted are sold by Firm A. Firms A and X share in the proceeds from the sale of the residue gas and the natural gas liquid products on a percentage basis pursuant to the "net-black" contract.

In May 1973, the inlet ("wet") volume of the gas processed at Firm A's plant, excluding condensate (i.e., liquids which are separated from natural gas by mechanical separators), was 3000 MCF's and the outlet (residue) gas volume was 1950 MCF's. In August 1975, the inlet volume, excluding condensate, was 1600 MCF's (1920 MMBTU's) and the outlet was 1248 MMBTU's. Firm A's contracts in effect on May 15, 1973 permitted the price of residue gas to be determined either by reference to the volume (MCF) of residue gas without reference to BTU content or by reference to the BTU content (MMBTU) of the residue gas. The actual price received by A for gas delivered during May 1973, was computed pursuant to the price per MCF terms in the contracts. Firm A's sales contracts for residue gas in effect in August 1975 provided for the price of residue gas to be determined by reference to the BTU content of the residue gas.

During each month a portion of the residue gas equal to approximately 10 percent of the residue volume was used by Firm A as plant fuel to operate its extraction facilities.

In May 1973, Firm A delivered to Firm X residue gas equal to 10 percent of the outlet volume for fuel to oper-

ate Firm X's production wells ("lease fuel") and for the purpose of injection at the well site to maintain pressure for production ("injection gas"), in accordance with contractual requirements. In August 1975, Firm A delivered to Firm X residue gas equal to 5 percent of the outlet BTU value for use as injection gas and as lease fuel, under new contractual terms calling for BTU measurement of inlet and residue volumes, and requiring the return of lesser amounts of residue gas for these purposes. In August 1975, Firm A "flared" its total butane production, consisting of 5 MMBTU's.

On May 15, 1973, Firm A sold the residue gas at a weighted average rate of \$.20 per MCF. In August 1975, it sold the residue gas at a weighted average rate of \$.60 per MMBTU.

Firm B. Firm B, a natural gas producer, also extracts mixed natural gas liquids from the natural gas stream and then sells those mixed natural gas liquids to Firm Y, a gas plant operator. Firm Y fractionates the natural gas liquids and sells the natural gas liquid products.

In May 1973, the inlet ("wet") gas volume at Firm B's plant was 3000 MCF's, excluding condensate. During that month, Firm B extracted a mixed natural gas liquid stream consisting of 3125 gallons of propane, 1666 gallons of butane, 6250 gallons of natural gasoline (primarily, pentanes, isopentanes, hexanes, and heptanes), and 6026 gallons of ethane. The outlet (residue) gas during May 1973 was measured at 2060 MMBTU.

In August 1975, the inlet volume was 1600 MCF's excluding condensate. Natural gas liquids extracted amounted to 1625 gallons of propane, 1000 gallons of butane, 3000 gallons of natural gasoline, and 3999 gallons of ethane. The outlet (residue) gas during August 1975 was measured at 1070 MMBTU. In each month, Firm B utilized 10 percent of the residue gas as plant fuel and an additional 10 percent of the residue gas to operate its wells and as injection gas, and sold the remainder.

On May 15, 1973, Firm B sold the residue gas at a weighted average rate of \$.20 per MMBTU. In August 1975, it

sold the residue gas at a weighted average rate of \$.60 per MMBTU.

Measurement of Firm B's "residue" or outlet natural gas both in May 1973, and August 1975, was made on a BTU basis. However, since the inlet gas was measured on a volumetric basis during those months and since the precise BTU content of the inlet gas is not known, Firm B has computed the calorific (BTU) value of the mixed stream extracted from the gas as the basis for computing its increased cost of natural gas shrinkage. The calorific value of the mixed stream extracted by Firm B, measured at 60 F. and at 14.7 psia, is 91,065 BTU's per gallon for the propane content, 102,600 BTU's per gallon for the butane content, 110,000 BTU's per gallon for the natural gasoline content, and 66,300 BTU's per gallon for the ethane content.¹

Issue 1: What costs may Firm A and B attribute as allowable increased costs of natural gas shrinkage?

Issue 2: What is the correct method of computing the amount of increased costs of natural gas shrinkage which may be passed through in prices charged for products?

RULING

1. Section 212.166, dealing with the calculation of increased product costs, states that such costs include:

... the difference between the weighted average cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the month of May 1973, and the weighted average cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the current month, multiplied by the number of thousand cubic feet (MCF's) of natural gas processed in the current month.

"Cost of natural gas shrinkage" is defined in § 212.162 as:

(T)he reduction in selling price per thousand cubic feet (MCF) of natural gas proc-

¹The conversion factors used in this fact situation are taken from a table of physical constants for hydrocarbons located in the Ninth Edition of the Natural Gas Processors Suppliers' Association (NGPSA) Engineering Data Book, compiled and edited in cooperation with the Gas Processors Association, 1972.

essed, which is attributable to the reduction in volume or BTU value of the natural gas resulting from the extraction of natural gas liquids, as determined pursuant to the contract in effect at the time for which cost of natural gas shrinkage is being measured, and under which the processed gas is sold.

"Natural gas liquids" are defined in § 212.162 as:

(A) mixed hydrocarbon stream containing, in whole or in substantial part, mixtures of ethane, butane (iso-butane and normal butane), propane or natural gasoline.

The definition of "cost of natural gas shrinkage" makes clear that the reduction in proceeds from the sale of processed natural gas, resulting from the extraction of the natural gas liquids, constitutes a cost which may be included in the calculation of increased product costs pursuant to § 212.166. However, it also makes clear that only those shrinkage costs which are "attributable to the reduction in volume or BTU value of the natural gas resulting from the extraction of natural gas liquids" are included in the "cost of natural gas shrinkage." (Emphasis added.) Hence, to qualify as an increased product cost, any shrinkage cost must be related to the extraction process, which DOE defines to include only the extraction of natural gas liquids from the "wet" gas stream.

Applying this test, DOE has determined that condensate, plant fuel, lease fuel, injection gas, flared gas, and ethane should be treated as follows in computing the cost of natural gas shrinkage:

a. *Condensate.* Condensate occurs in nature as the heavy hydrocarbon portion of natural gas in the underground reservoir, and is mechanically separated from natural gas as a liquid through a process of retrograde condensation, involving pressure reduction, sometimes accompanied by a reduction in temperature as well. In some cases, condensate is separated from natural gas by conventional lease separation facilities ("surface separators") at the well-head, and in other cases by a single mechanical separator ("field facility") located centrally and servicing two or more wells, and in either case is typically referred to as "leave condensate". In yet other cases,

condensate is not separated from natural gas until it reaches a mechanical separation device similar to a surface separator or field facility, but located instead at the inlet side of a gas processing plant ("inlet separator" or "scrubber") and, in that case, the condensate is referred to as "plant condensate".

Condensate is to be distinguished from the lighter natural gas liquids and natural gas liquid products, whether fractionated or in a mixed stream of natural gas liquids, which are incapable of being separated from natural gas by mechanical means only and are generally recovered from natural gas at a gas processing plant by absorption, adsorption, or extraneous refrigeration processes. In light of these distinctions, the DOE has determined that condensate should, as a general matter, be treated as crude oil under Subpart D of the price regulations, rather than as natural gas liquids or natural gas liquid products which are treated under Subpart K of the price regulations. Therefore, any reduction in the value of "wet" natural gas which results from the separating out of condensate lacks the requisite connection with the extraction of the natural gas liquids, even though both processes may be performed at the same processing facility by the same party.

b. *Plant fuel.* The natural gas stream is also reduced by the removal of a certain quantity of gas, typically in the form of residue gas, which is utilized as plant fuel in the extraction process. Since the plant fuel is taken exclusively from feedstock for use in the extraction processes, it is included in the cost of natural gas shrinkage.

Plant fuel is allowed as a shrinkage cost to any firm which extracts natural gas liquids and uses the fuel in connection therewith, whether it is a gas processor or gas producer. Thus Firms A and B may include as shrinkage the reduction in gas volume resulting from its use as plant fuel. However, Firms A and B may not include as shrinkage any reduction in gas volume associated with operations other than the extraction of natural gas liquids.

It should be noted that, in permitting gas processing refiners to include

the cost of plant fuel in the total of product costs calculated pursuant to the provisions of Subpart K, the DOE has provided different treatment for gas processors' fuel costs than is provided in Subpart E for the fuel costs of crude oil refiners. Refinery fuel costs are included, under Subpart E, in the total of a crude refiner's non-product costs. The reasons for the different treatment of these seemingly analogous costs are four:

(1) The analogy drawn between refinery fuel and gas plant fuel is merely superficial. Refinery fuel typically consists, in part, of some portion of the crude oil feedstock and, in part, of other fuels including natural gas, natural gas liquids, and electricity. Plant fuel consists almost exclusively of fuels derived from the "wet" (inlet) gas stream. Although the inclusion of the cost of feedstocks used as plant fuel in the total of product costs reflects an identifiable nexus between the product and the feedstock from which it is derived, the inclusion of the cost of other non-related fuels in the total of product costs cannot be justified on the same basis;

(2) Crude oil refiners are automatically permitted under Subpart E to passthrough their increased non-product costs, subject to a profit margin limitation, while gas processing refiners are limited under Subpart K to a passthrough of no more than \$.005 per gallon of non-product cost increases incurred;

(3) Increased plant fuel costs were not taken into account by the DOE in its decision to limit the passthrough of gas processors' increased non-product costs to a \$.005 per gallon increment; and

(4) In light of the fact that there are more than 700 gas plants in the United States processing products subject to the Subpart K price rules and since plant fuel is not uniformly measured among these plants, the prospect of a requirement that the cost of plant fuel be measured as a discrete amount to be excluded from the total of shrinkage costs otherwise calculated represented an undue administrative burden both for the smaller independent gas processors in their efforts to comply with DOE price rules and for

the DOE in its efforts to enforce its regulations.

c. *Lease fuel and injection gas.* In certain situations a portion of the natural gas stream may be used to provide lease fuel and/or injection gas. The contract which Firm A has with Firm X, for example, requires the gas plant operator to furnish the producer with lease fuel and injection gas from the residue gas which remains after processing of the "wet" natural gas. These quantities of residue gas are to be used for the specific purpose of servicing the producer's wells. In similar fashion Firm B uses a portion of the residue gas that remains after the extraction process to operate its own wells and to maintain well pressure for production. Lease fuel and injection gas do not constitute allowable shrinkage to Firms A and B, since they are not attributable to the reduction in volume or BTU value of the natural gas resulting from the extraction of natural gas liquids, but instead represent the diversion of a portion of the residue gas to supply certain needs associated with the production of the "wet" natural gas. Hence, they lack the requisite nexus with the extraction operation to constitute shrinkage.

d. *Flared natural gas liquid products.* The DOE is aware that some gas processors have engaged in the practice known as "flaring" from time to time. It involves the burning of certain natural gas liquid products because temporary demand shortfall overburdens existing storage facilities, or for other reasons. Since there is a reduction in the selling price of processed gas attributable to the extraction of the natural gas liquids from which the flared product has been separated, the total amount of all natural gas liquid products extracted from the natural gas stream in the processing operation, including any product which is later flared, is properly taken into account in determining the cost of natural gas shrinkage for the purposes of calculating increased product costs. However, since the flaring of a particular natural gas liquid product, such as butane in the case of Firm A, represents action implementing a business decision formulated in response to market conditions or other circum-

stances, it is regarded as a use which produces economic value for Firm A. The DOE has previously determined that the internal consumption of covered products in such a manner requires that the same increment of increased product cost be assigned to them as is assigned to such products in determining the selling price for those products in arms-length transactions, with the increment of increased product cost so assigned to be regarded as recouped by Firm A when it flares the product, and therefore no longer available for pass through in price charged by Firm A in arms-length transactions (Ruling 1974-27).

e. *Ethane.* Since ethane is included within the definition of "natural gas liquids" in § 212.162, the cost of natural gas shrinkage, which is defined in terms of the reduced selling price for natural gas attributable to the extraction of natural gas liquids, includes any reduction in the selling price of processed natural gas attributable to the extraction of ethane. Thus, the increased cost of natural gas shrinkage also includes increases in the cost of shrinkage due to ethane. It should be noted, however, that the increased product costs, including the increased cost of natural gas shrinkage, which are allocated among natural gas liquids and natural gas liquid products pursuant to § 212.167, are reduced by the portion of such costs attributable to the production and sale of ethane under paragraph (a) of that section.

2. Computation of the increased cost of natural gas shrinkage which is included in the calculation of increased product costs pursuant to § 212.166 requires a comparison of the "weighted average cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed" during the month of May 1973 and during the current month. The "cost of natural gas shrinkage" is computed, as defined in § 212.162, by determining the reduction in selling price of the processed gas attributable to the extraction of natural gas liquids, by reference to the contract price in effect for the relevant month.

Although the concept of the "cost of natural gas shrinkage," as it is defined in § 212.162, does not appear unduly

complex, computation of the "reduction in selling price" can be complicated where, as with Firm A, the price terms in effect during the two relevant periods differ or where, as with Firm B, the extent of the shrinkage in the natural gas stream attributable to the extraction of liquids cannot be determined simply by comparing the inlet and outlet measurements of the natural gas stream. In order to provide guidance as to the appropriate methods of determining the "cost of natural gas shrinkage" under such circumstances, the DOE has developed two formulae consistent with the ruling on Issue #1.

a. The following formula describes the appropriate method of determining the weighted average cost of shrinkage where inlet and outlet quantities are measured on comparable bases during the relevant time period (hereinafter referred to as the "inlet-outlet" method).

$$C_{\text{avg}} = (I - O)P / I_{\text{MCF}}$$

Where:

C_{avg} —The weighted average cost of natural gas shrinkage.

I —The volume (MCF's) or BTU value of inlet gas, exclusive of any condensate (which is "crude oil" as that term is defined in § 212.31).

O —The volume (MCF's) or BTU value of outlet (residue) gas (including all quantities of residue gas utilized as lease fuel or as injection gas, but excluding all quantities of residue gas utilized as plant fuel).

P —The weighted average price per unit (MCF or BTU) for processed natural gas, as determined pursuant to the contracts in effect at the time for which the cost of natural gas shrinkage is being measured, and under which the processed natural gas is sold.

I_{MCF} —The volume in MCF's of the inlet gas, exclusive of any condensate (which is "crude oil" as that term is defined in § 212.31).

The inlet-outlet method should be used whenever the inlet and outlet gases are measured on the same basis during the relevant period. It is not necessary that the same units of measurement be used in both May 1973 and the month for which increased shrinkage cost is measured, however. Thus, the inlet-outlet method should be used when both inlet and outlet gases were

measured in MCF's in May 1973 and both are measured in BTU's today, or vice-versa.

b. Where the amounts of inlet and outlet gas are measured on different bases during the same time period, it may not be possible, as in the case of Firm B, to convert the inlet and outlet amounts to the same unit of measurement. Under such circumstances, a different method of computation of cost of shrinkage (hereinafter referred to as the "conversion" method) should be used.

This procedure involves the conversion of the volume of the mixed stream of natural gas liquids or of each covered natural gas liquid product (propane, butane, and natural gasoline), and of ethane, from liquid volumetric measure (gallons) either to the equivalent gaseous volumetric measure (MCF's) or to BTU measurement, whichever is consistent with the price term of the contract under which the residue gas is sold. This is accomplished by the employment of a conversion factor for each product. Such factors may be found in a conversion table or may be determined by a chemical analysis of the stream.¹

The MCF or BTU values for the covered natural gas liquid products are added together. The resultant aggregate MCF or BTU value of natural gas liquids and natural gas liquid products, plus the MCF or BTU value of any plant fuel, constitutes the measure of shrinkage.

The aggregate value thus derived may be substituted in the following

¹DOE is aware that a number of different conversion tables are used in the industry and that they are not identical. However, while the use of different tables may cause some variation in result, the range of deviation does not at this time appear to be significant. Since it is not possible at this time for DOE to identify and to approve a single conversion table for use, it shall be permissible to use any published conversion table which is generally accepted by petroleum engineers in the United States, provided that the table which is used is prominently identified in the calculations, and provided also that DOE shall have the right to review the use of particular conversion tables and to prohibit the use of any conversion table which it considers to be unacceptable.

formula for the calculation of the cost of natural gas shrinkage:

$$C_{ng} = V \times P / I_{MCF}$$

Where:

C_{ng} —The weighted average cost of natural gas shrinkage.

V —The aggregate value in MCF or BTU of the natural gas liquids, natural gas liquid products, ethane, and plant fuel extracted from the processed gas stream, determined by converting them to the unit of measurement by which the residue gas is sold, in accordance with the procedures discussed above.

P —The weighted average price per unit (MCF or BTU) for processed natural gas, as determined pursuant to the contracts in effect at the time for which the cost of natural gas shrinkage is being measured, and under which the processed natural gas is sold.

I_{MCF} —The volume in MCF's of the inlet gas, exclusive of any condensate (which is "crude oil" as that term is defined in § 212.31).

The contract terms in effect during the relevant period determine whether volume (MCF's) or BTU value is to be used to calculate each of the elements set forth in the numerators of the above formulae when determining the weighted average cost of natural gas shrinkage during that period, in accordance with the definition of "cost of natural gas shrinkage" in § 212.162.

In calculating increased product costs, Subpart K provides that the increased cost of natural gas shrinkage portion of the total shall be

difference between the *weighted average* cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the month of May 1973, and the *weighted average* cost of natural gas shrinkage per thousand cubic feet (MCF) of natural gas processed in the current month, multiplied by the number of thousand cubic feet (MCF's) of natural gas processed in the current month. 10 CFR 212.166(b)(2) (emphasis added).

The purpose of requiring a "weighted average" cost comparison is to provide a method by which firms which have chosen, pursuant to § 212.167(b), to aggregate the total amount of increased product costs respecting volumes of natural gas subject to differing sales contracts which are processed in one or more plants, may calculate a single amount representing the increased

costs of natural gas shrinkage for the aggregate of volumes of natural gas processed. Accordingly, the above formulae provide the acceptable methods for the computation of a "weighted average cost of natural gas shrinkage." Where the increased costs associated with several volumes of processed natural gas have been aggregated, the residue price which is used to determine the cost of natural gas shrinkage is a weighted average of all contract price terms under which the different volumes of processed natural gas are sold.

The foregoing methods of determining cost of shrinkage are applied with respect to Firms A and B to determine the amount of increased cost of shrinkage for August, 1975, in the above fact situations as follows:

Firm A. Firm A's shrinkage costs are determined by application of the inlet-outlet method. Since Firm A's actual price charged for residue gas during the May 1973 period was determined by reference to a fixed rate per MCF, even though Firm A's contract with Firm X permitted reference to either MCF or BTU content, MCF values must be used in calculating the "cost of natural gas shrinkage" for May 1973. In later periods the price terms of Firm A's contracts make reference to BTU content and this unit of measurement is appropriate for use. This illustrates the "cross-over" which arises in calculating increased cost of shrinkage on the basis of shrinkage amounts in different periods under different contracts.

In accordance with the Ruling on Issue No. 1, the outlet (residue) gas volume is reduced by the amount of residue gas utilized as plant fuel so that plant fuel is included in computing the weighted average cost of natural gas shrinkage.

I. Increased Cost of Natural Gas Shrinkage

A. Cost of Natural Gas Shrinkage for the Month of May 1973

Department of Energy

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$$C_{in} = [(I - O) P / I_{MCF}]$$

(1)

$$C_{in} = [(3000 \text{ MCF [inlet gas]} - 1755 \text{ MCF [outlet gas, less 10% used as plant fuel]} \times \$0.20 \text{ per MCF [price of residue gas]}] / 3000 \text{ MCF [inlet gas]}$$

(2)

$$C_{in} = [(1245 \text{ MCF} \times \$0.20 \text{ per MCF}) / 3000 \text{ MCF}]$$

(3)

$$C_{in} = \$249 / 3000 \text{ MCF}$$

(4)

$$C_{in} = \$0.08 / \text{MCF}$$

(5)

B. Cost of Natural Gas Shrinkage for the Current Month of August 1975

$$C_{in} = [(I - O) P / (I_{MCF})]$$

(1)

$$C_{in} = [(1920 \text{ MMBTU [inlet gas]} - 1123 \text{ MMBTU [outlet gas, less 10% used as plant fuel]} \times \$0.60 \text{ per MMBTU [price of residue gas]}] / 1800 \text{ MCF [inlet gas]}$$

(2)

$$C_{in} = [(797 \times \$0.60) / 1800 \text{ MCF}]$$

(3)

$$C_{in} = \$478.20 / 1800 \text{ MCF}$$

(4)

$$C_{in} = \$0.30 \text{ per MCF}$$

(5)

C. Increased Cost of Shrinkage

$$[\text{Increased cost of shrinkage} = (C_{in} (\text{Aug.}) [\text{current shrinkage cost}] - C_{in} (\text{May}) [\text{May, 1973 shrinkage cost}] \times (I_{MCF} (\text{Aug.}) [\text{current inlet gas}])$$

(1)

$$= [(\$0.30 \text{ per MCF} - \$0.08 \text{ per MCF}) \times 1800 \text{ MCF}]$$

(2)

$$= [(\$0.22 \text{ per MCF}) \times 1800 \text{ MCF}]$$

(3)

$$= \$352.00$$

(4)

Firm B. Although Firm B is a gas producer rather than a gas operator, it is entitled to pass through the increased cost of shrinkage since it has extracted the natural gas liquids from the natural gas stream.

Firm B's fact situation is an example of the instance where employment of the conversion method, rather than inlet-outlet method, should be used.

Firm B has inlet readings only on a volumetric basis, and its sales contracts are in BTU values. To compute shrinkage, the values for natural gas liquid products and ethane are converted from liquid volumetric measurement (gal.) to BTU values. Increased cost of shrinkage is then calculated according to the standard method set forth above.

Allowed amounts include the BTU value of the covered natural gas liquid products, ethane, and plant fuel, but not lease fuel or injection gas.

I. Increased Cost of Natural Gas Shrinkage

A. Cost of Natural Gas Shrinkage for the Month of May 1973

(1) Conversion of liquid products to BTU value.

(a) Propane:

$$\begin{aligned} \text{BTU value} &= 3125 \text{ gal} \times 91065 \text{ (BTU content per gallon)} \\ &= 285 \text{ MMBTU} \end{aligned}$$

(b) Butane:

$$\begin{aligned} \text{BTU value} &= 1666 \text{ gal} \times 102,600 \text{ (BTU content per gallon)} \\ &= 171 \text{ MMBTU} \end{aligned}$$

(c) Natural Gasoline:

$$\begin{aligned} \text{BTU value} &= 6250 \text{ gal} \times 110,000 \text{ (BTU content per gallon)} \\ &= 687 \text{ MMBTU} \end{aligned}$$

(d) Ethane:

$$\begin{aligned} \text{BTU value} &= 6026 \text{ gal} \times 66,330 \text{ (BTU content per gallon)} \\ &= 400 \text{ MMBTU} \end{aligned}$$

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$$C_{ng} = [(V \times P) / I_{MCF}]$$

(2)

$$C_{ng} = [(285 \text{ MMBTU[propane]} + 171 \text{ MMBTU[butane]} + 687 \text{ MMBTU[natural gasoline]} + 400 \text{ MMBTU[ethane]} + 206 \text{ MMBTU[plant fuel]}] \times \$0.20 \text{ [price of residue gas]} / 3000 \text{ MCF [inlet gas]}$$

(3)

$$C_{ng} = [(1749 \times \$0.20) / 3000 \text{ MCF}]$$

(4)

$$C_{ng} = [\$349.80 / 3000 \text{ MCF}]$$

(5)

$$C_{ng} = \$0.12 / \text{MCF}$$

(6)

B. Cost of Natural Gas Shrinkage for the Current Month of August 1975

(1) Conversion of liquid stream components to BTU value.

(a) Propane:

$$\begin{aligned} \text{BTU value} &= 1625 \text{ gal.} \times 91065 \text{ (BTU content per gallon)} \\ &= 148 \text{ MMBTU} \end{aligned}$$

(b) Butane:

$$\begin{aligned} \text{BTU value} &= 1000 \text{ gal.} \times 102,600 \text{ (BTU content per gallon)} \\ &= 103 \text{ MMBTU} \end{aligned}$$

(c) Natural Gasoline:

$$\begin{aligned} \text{BTU value} &= 3000 \text{ gal.} \times 110,000 \text{ (BTU content per gallon)} \\ &= 330 \text{ MMBTU} \end{aligned}$$

(d) Ethane:

$$\begin{aligned} \text{BTU value} &= 3000 \text{ gal.} \times 88,330 \text{ (BTU content per gallon)} \\ &= 265 \text{ MMBTU} \end{aligned}$$

$$C_{ng} = [(V \times P) / I_{MCF}]$$

(1)

$$C_{ng} = [(148 \text{ MMBTU[propane]} + 103 \text{ MMBTU[butane]} + 330 \text{ MMBTU[natural gasoline]} + 265 \text{ MMBTU[ethane]} + 107 \text{ MMBTU[plant fuel]}] \times \$0.60 \text{ [price of residue gas]} / 1600 \text{ MCF [inlet gas]}$$

(2)

$$C_{ng} = [(953 \times \$0.60) / 1600 \text{ MCF}]$$

(3)

$$C_{ng} = [\$571.8 / 1600 \text{ MCF}]$$

(4)

$$C_{ng} = \$0.36 / \text{MCF}$$

(5)

C. Increased Cost of Natural Gas Shrinkage

[\$0.36 per thousand cubic feet (current shrinkage cost)—\$0.12 per thousand cubic feet (May 1973 shrinkage cost)] $\times$ 1,600 MCF (current inlet gas)]

$$= \$0.24 / \text{MCF} \times 1600 \text{ MCF}$$

$$= \$384.00$$

Some of the numbers in the above examples have been rounded off to simplify this ruling. Actual computations by firms subject to the DOE price rules should be carried out with maximum practicable accuracy.

[40 FR 55860, Dec. 2, 1975]

RULING 1976-1—ALLOCATIONS WITH RESPECT TO NEWLY CONSTRUCTED OR PURCHASED REFINERIES UNDER CRUDE OIL BUY/SELL PROGRAM

Facts. Refiner A (a refiner-buyer, as defined in 10 CFR 211.62) owned a refinery which became operational on September 1, 1974. Since a significant portion of the construction of the refinery had been completed prior to May 1, 1974, for purposes of receiving allocations of crude oil under the crude oil buy/sell program set forth in 10 CFR 211.65 (the "buy/sell program"), DOE determined that Refiner A's refinery qualified as "new refining capacity". Refiner A was therefore entitled to purchase crude oil under the buy/sell program for that refinery commencing with the September through November 1974 allocation quarter. On January 1, 1975, Refiner A sold the refinery to Refiner B, also a refinery-buyer, which thereafter continued to operate the refinery.

Issue. How is Refiner B's purchase opportunity under 10 CFR 211.65 calculated with respect to the refinery purchased by it from Refiner A?

Ruling. Refiner A's crude oil allocation for the refinery, which was based on the qualification on that refinery as "new refining capacity" as to Refiner A, is not carried over as to Refiner B upon its purchase of the refinery. Crude oil allocations under the buy/sell program would be made to Refiner B for the acquired refinery on the basis if the criteria for "future refining capacity" in accordance with the provisions of § 211.65(b).

DOE's buy/sell program was established in its present form effective June 1, 1974 to correct the imbalances in access to crude oil supplies which exist between major integrated refiners, on the one hand, and small and independent refiners, on the other.

Under the program, each small and independent refiner as defined in 10 CFR 211.62 (a "refiner-buyer") is generally entitled to purchase from one or more of the 15 largest integrated domestic refiners ("refiner-sellers") in each three-month allocation quarter an amount of crude oil equal to one-quarter of its crude oil runs to stills in 1972 less the volume of its runs to stills in the period February through April 1974, subject to certain adjustments.

For purposes of these calculations a refiner-buyer's 1972 refining capacity is termed "refining capacity", which is defined in § 211.62 to mean:

*** for each refinery, the capacity reported to the Bureau of Mines as of January 1, 1973.***

In addition to an allocation entitlement based on 1972 crude oil runs, which would be directly related to the particular firm's 1972 refining capacity, the regulations provide for an increase in allocations to refiner-buyers to take into account expansion of refining facilities after 1972. Post-1972 refining capacity, the construction of which was substantially completed by May 1, 1974 ("new refining capacity"), is distinguished in the regulations from other more recently constructed refining capacity ("future refining capacity").

Section 211.62 provides that:

"New refining capacity" means, for each refiner, the sum of the capacity of its refineries not included within the definition of refining capacity and operated continuously in the normal course of such refiner's business, a significant portion of the construction of which has been completed prior to May 1, 1974 ***.

In accordance with § 211.65(a)(5), a refiner-buyer whose post-1972 refining capacity qualifies as new refining capacity is automatically entitled to an increase in its purchase opportunity under the buy-sell program by an amount necessary to permit that refiner-buyer to operate such new refining capacity at its 1972 supply-to-capacity ratio, giving effect to supplies available for such new refining capacity in excess of supplies included in that refiner-buyer's February through April 1974 crude runs.

Future refinery capacity is defined in § 211.62 as follows:

Future refining capacity means, for each refiner, the sum of the capacity of its refineries not included within the definitions of refining capacity and new refining capacity ***.

Under § 211.65(b), allocations for future refining capacity are to be specified by DOE upon consideration of the following factors:

(i) The source and volume of anticipated crude oil supplies for such future refining capacity;

(ii) The efforts made by that refiner-buyer to obtain or locate crude oil supplies for such future refining capacity;

(iii) The projected ability of all refiner-sellers to obtain supplies of crude oil for their refinery capacity;

(iv) The economic feasibility of operating such future refining capacity absent any allocations;

(v) The extent to which such future refining capacity is designed to implement the national policies relating to protection of the environment; and

(vi) The extent to which such future refining capacity incorporates high conversion facilities and the patterns of product yield conform to the anticipated national requirements for refinery products.

A detailed discussion of these criteria appears in the Appendix hereto, together with a description of DOE's current application thereof.

As set forth in the Appendix, it is the clear intent that the criteria gov-

erning allocations for further refining capacity be applied to prevent uneconomic new entrants into the refining industry from automatically receiving crude oil allocations, which allocations would tend to reduce incentives for these firms to arrange for their own crude supplies. The regulatory distinction between allocations for new refining capacity and future refining capacity is designed primarily to avoid encouragement of firms to construct inefficient refineries for the sole purpose of receiving government-directed allocations.

The regulations thus limit automatic allocations for post-1972 refining capacity to new refining capacity, or capacity a significant portion of the construction of which was completed by May 1, 1974. DOE's rationale in this regard was that such capacity would have been planned and the necessary financial commitments therefor made by late 1973, with no knowledge of or intent to rely on a continuing government allocation program. Therefore, new refining capacity as so defined would in most cases be economically viable absent federal allocation programs, and allocations are made on the same basis as for 1972 capacity.

However, with respect to all other post-1972 refining capacity, i.e., future refining capacity, application of the factors set forth in § 211.65(b)(1) provides for allocations under the program only to firms that demonstrate an economically viable venture, which is generally evidenced by arrangements made by the particular firm for crude oil supplies and by the sophistication of its refinery.

In applying the policy considerations upon which the allocations under the buy/sell program are based for post-1972 capacity, it is clear that the criteria set forth in § 211.65(b)(1) should be equally as applicable to purchased refineries as to newly constructed refineries. A firm that decides to enter the refining industry, or to increase its refining capacity, has essentially two means of accomplishing this purpose. It may either construct a new facility (or an addition to one of its current facilities), or alternatively it may purchase an existing refinery owned by another firm. No public interest would

be served if DOE were to encourage new entrants into the refining industry to purchase existing refinery capacity which is not economically viable by automatically granting crude oil allocations, while denying such allocations to newly constructed refinery capacity which is not economically viable. In fact, in order to best serve the needs of the nation, DOE should positively encourage the construction of new, technically sophisticated refineries which have made arrangements for crude oil supplies, rather than encourage the sale of less sophisticated refineries with no assured source of crude oil supplies. Thus, the criteria set forth in § 211.65(b)(1), which are used to evaluate the economic viability of future refining capacity are as germane to purchased refineries as to newly constructed refineries.

Finally, the implication of the defined terms "refining capacity" and "new refining capacity" is that the firm that had actually reported the capacity to the Bureau of Mines or that had completed a significant portion of the construction thereof prior to May 1, 1974 is the firm as to which these respective classifications should apply, as opposed to a subsequent purchaser of the refinery in question. This analysis is consistent with the other provisions of § 211.65 fixing refiner-buyers' purchase opportunities, since the latter are generally determined by a particular refiner's 1972 and 1974 crude run levels, which in turn relate to the refinery capacity operated by that refiner in those periods. Therefore, the clear intent of the regulations is that the classification of a particular refinery under the buy/sell program as refining capacity or new refining capacity requires that the firm receiving the benefits of such a classification must have reported the capacity to the Bureau of Mines as of January 1, 1973, or have completed a significant portion of the construction thereof prior to May 1, 1974.

In summary, allocations under the buy/sell program pursuant to § 211.65 do not attach to particular refineries but rather to the firm that owned the refinery in the relevant period specified in the regulations. Thus, the purchase of a refinery on January 1, 1975

would not effect the transfer to the purchasing firm of any of the allocation rights under the buy/sell program attributable to the firm that previously owned that refinery. The allocation amount for the firm that has purchased the refinery would be fixed under the criteria for future refining capacity in § 211.65(b). This result would be the same if the refinery were purchased from a refiner-seller, where there would be no allocation rights attributable to the refinery.

APPENDIX—EVALUATION OF APPLICATIONS FOR FUTURE REFINING CAPACITY ALLOCATIONS UNDER 10 CFR 211.65(b)

I. Introduction

The Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, provides that the Department of Energy ("DOE"), when developing regulations governing the allocation of crude oil and refined petroleum products, may take into consideration (1) market entry by independent and small refiners during or subsequent to calendar year 1972, and (2) expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972 (EPAA section 4(c)(4)(B)).

Pursuant to this statutory authority, the DOE promulgated paragraph (b) of 10 CFR 211.65 (the Mandatory Crude Oil Allocation Program or "Buy/Sell Program"), in order to evaluate applications for an allocation of crude oil submitted by operators of newly developed or expanded refining capacity scheduled to be completed and to become operational subsequent to May 1, 1974. This capacity has been defined in the regulations as "future refining capacity" (10 CFR 211.62).

Under § 211.65(b), DOE is committed to fostering future refining capacity. This does not mean, however, that any future refining capacity is automatically eligible for allocations. Quite the contrary, DOE is prepared to provide buy/sell allotments only in those circumstances in which an applicant for an allocation satisfies the criteria enumerated in § 211.65(b)(1) concerning, *inter alia*, the crude oil supply arrangements and the economic viability and operating flexibility of any future refining facilities. These criteria are designed in large part to encourage the construction of independent, viable refining facilities by granting these facilities allocations to supplement their own supply arrangements. DOE does not intend to foster (through the automatic award of allocations) the construction of future refining capacity which would not remain viable after the DOE's allocation and price regulations terminate.

Moreover, DOE does not intend to grant allocations for the operation of future refining capacity in cases where supplies of suitable crude oil are otherwise available, albeit at a price higher than that required to be charged for crude oil purchased under the Buy/Sell Program. The Buy/Sell Program is designed to correct supply imbalances between the major integrated refiners on the one hand and small and independent refiners on the other. Although the Buy/Sell Program was initially also relied upon to effectuate some degree of cost equalization, this subsidiary purpose is no longer essential, since cost equalization is now achieved to a considerable degree under the DOE's Crude Oil Entitlements Program in 10 CFR 211.67. Accordingly, DOE currently views the Buy/Sell Program, including allocations for future refining capacity, solely as a means of providing crude oil to small and independent refiners for supply purposes in appropriate circumstances.

Section 211.65(b)(1) sets forth six factors which DOE must consider when establishing an allocation level for future refining capacity under the Buy/Sell Program. In order for the DOE to ensure equitable and consistent treatment for all applications made pursuant to 10 CFR 211.65(b), a method of weighting these six factors has been developed. The DOE recognizes that information required for its consideration of these six factors may, in some cases, be overlapping and that conditions such as crude oil availability, local marketing conditions and independent, economic viability may vary considerably with each application. Consequently a range of points has been incorporated for each factor in recognition of the relative uniqueness of each case.

A total of one hundred points has been distributed among the factors to be considered under § 211.65(b)(1). For reasons explained within, the third and fifth factors have not been assigned any points, and, of the remaining four factors, not all have been assigned the same range of points. Points have been distributed among these factors on the basis of their relative importance to the underlying purposes of the Buy/Sell Program and the DOE's policies pertaining to the operation of future refining capacity.

The DOE is making its method of weighting the six factors available to the public in the interest of the fullest possible disclosure of the administrative decision-making processes and in compliance with 5 U.S.C. 552(a)(2) (the Freedom of Information Act). Accordingly, set forth below is a discussion of each of the six factors listed in § 211.65(b)(1) of the regulations and the manner in which they will be evaluated and

applied by DOE in determining allocation entitlements for future refining capacity:

II. Evaluation of the Factors in § 211.65(b)(1)

(i) The source and volume of anticipated crude oil supplies for such future refining capacity.

The quantity of crude oil which has been secured by the refiner outside the Buy/Sell Program for the operation of future refining capacity is of prime importance in DOE's consideration of an allocation entitlement because it is convincing evidence that such future capacity represents an economically viable enterprise capable of functioning in the future without government assistance. The DOE's concern is that a refiner should have secured an adequate source of crude oil prior to making such additional capacity operational. The crude oil allocation program is not designed to become a sole source of supply for a refiner, except perhaps in circumstances where, due to a government program (such as the crude oil supplier/purchaser freeze in 10 CFR 211.63), a refiner is unable to obtain supplies that would otherwise have been available.

This factor is assigned a range of zero (0) to thirty (30) points. This is slightly greater than the range of points assigned to any of the other factors, principally because the DOE believes that securing an adequate supply of crude oil prior to operating future refining capacity is consistent with traditional industry practice and is the most convincing indication that such capacity represents a viable enterprise which will be capable of operating without government assistance after the DOE's allocation and price programs terminate. A refiner with future refining capacity will be assigned points as a function of the volume of anticipated crude oil supplies (other than under the Buy/Sell Program) available to the applicant for such future refining capacity.

(ii) The efforts made by that refiner/buyer to obtain or locate crude oil supplies for such future refining capacity.

To be considered for inclusion in the program each refiner is expected to exert the utmost effort to assure itself of a supply of crude oil for its future refining capacity. DOE, therefore, requires documentation setting forth in detail the efforts of the refiner to secure crude oil supplies on its own initiative and the net results of such efforts. It is recognized that, in some instances, through no lack of planning and effort on the part of the refiner, non-allocation crude oil of suitable grade and quality may not be available for practicable delivery to the refinery. Proof of the refiner's diligent efforts to locate crude oil and evidence of the difficulties encountered, however, are necessary before DOE will award any points for such efforts.

This factor is assigned a range of zero (0) points to twenty-five (25) points. A refiner with future refining capacity will be assigned points proportional to the efforts which it has made to obtain or locate crude oil supplies for such future refining capacity.

(iii) The projected ability of all refiner/sellers to obtain supplies of crude oil for their refinery capacity.

Under a situation of limited crude oil supplies this factor would be quite important because it relates to sharing crude oil supplies among existing facilities and additional ones to be constructed or under construction. However, in the aggregate, there is currently no shortage of crude oil available to refiner-sellers. Consequently, at the present time this factor is assigned zero (0) points.

(iv) The economic feasibility of operating such future refining capacity absent any allocation.

This factor is similar to factor (i) above in that it is intended to provide for an allocation of crude oil to a refiner which can demonstrate that it has an economically viable venture but, through no fault of its own, finds itself without a sufficient supply of crude oil to operate such future refining capacity. Here, however, DOE is concerned not with the availability of crude oil supplies absent government allocations but with the economic viability of the future refining capacity, i.e., the ability of the refiner to operate such future capacity and to market its products without having to rely on the DOE's allocation and price programs. In this regard, it is important to emphasize that the Buy/Sell Program is concerned with ensuring that refiner-buyers receive adequate supplies of crude oil to operate their refineries. It is not DOE's intention, however, to substitute allocations under the program for supplies that could be obtained in the market at a higher price. DOE's Entitlements Program was implemented to reduce refiners' crude oil cost disparities to a competitive range, a function not currently within the scope of the Buy/Sell Program. Thus, an applicant under § 211.65(b)(1) must be able to demonstrate that its future refining capacity could be operated economically without allocations under the Buy/Sell Program, assuming that it had access to an adequate supply of suitable crude oil at market prices.

This factor is assigned zero (0) points to twenty-five (25) points. Points will be assigned in proportion to the applicant's ability to demonstrate that its future refining capacity would be economically feasible absent any allocations.

(v) The extent to which such future refining capacity is designed to implement the

national policies relating to the protection of the environment.

The environmental impact of future refining capacity must be taken into account. While environmental matters are principally the responsibility of other Federal and state regulatory agencies, the DOE believes it has an obligation to require each refiner to show evidence of compliance with applicable environmental regulations. It is highly improbable that new or expanded refining capacity could reach an operational stage without Federal and state environmental regulatory bodies having first reviewed its impact on the environment and required the refiner to comply with applicable federal and state environmental regulations. Therefore, DOE merely requires a refiner to submit evidence of its ability to comply with such environmental regulations. This factor is not weighted, but rather is considered in order to insure compliance with such environmental requirements. It is therefore assigned zero (0) points.

(vi) The extent to which such future refining capacity incorporates high conversion facilities and the patterns of product yield conform to the anticipated national requirements for refinery products.

It is expected that a future refining facility will be sufficiently sophisticated to produce refined products of the type and quality required in the relevant marketing area. For instance, a simple topping plant located in a rural area and producing significant volumes of residual fuel oil is unlikely to meet local product needs. Gasoline production must be of sufficient quality (octane) to operate today's internal combustion engines. Home heating and residual fuel oils must have a sulfur content low enough to meet air pollution requirements. Consideration must also be given to the capability of the future refining capacity to process crude oils of varying gravities and sulfur contents.

This criterion is assigned zero (0) points to twenty (20) points. This is slightly less than the range of points assigned to other factors, principally because operating flexibility is not as indicative of the future refining capacity's ability to be self-sustaining absent government support, which is the DOE's primary concern in encouraging operation of such capacity pursuant to § 211.65(b). However, operating flexibility is still an important consideration because the DOE does not want the Buy/Sell Program to be used to encourage the operation of unnecessary or outmoded refining capacity when the same resources could be used to operate more modern facilities capable of meeting current product demands. Points for this factor will be assigned to a refiner in proportion to its ability to refine a variety of crude oils and to produce finished

products suitable for use in its relevant market area.

III. Calculation of Allocation Level

Pursuant to the foregoing analysis, the DOE assigns each application for an allocation for future refining capacity a value that is equal to the sum of the points assigned for each factor evaluated. One hundred points is the maximum value that can be awarded. This value is expressed as a percentage (e.g., 65 points = .650).

Section 211.65(b)(2) requires the DOE to "endeavor to assure supplies to future refining capacity to enable such capacity to operate at the national supply to capacity ratio." However, as indicated above, the Buy/Sell Program is not intended to become a sole source of supply for a refiner but is intended only as a supplement to supplies which the refiner has been able to procure on its own. Therefore, except in the rare circumstance where a refiner can demonstrate that, irrespective of price, it has no other possible supply of crude oil available to it, DOE does not anticipate awarding an allocation equal to the national supply to capacity ratio.

In order to determine the appropriate volume of crude oil to be allocated to the future refinery capacity under consideration, in a manner consistent with § 211.65(b)(2), the following calculation is made:

1. The national supply to capacity ratio for 1972 (0.8725) is multiplied by the increment of future refining capacity (in barrels per calendar day).
2. This product is then multiplied by the number of days in an average calendar quarter (91.25).
3. From this result is subtracted the refiner's available crude oil for the future refining capacity. (Available crude oil is that which is obtained from outside the allocation program.)
4. The result obtained from the previous calculation is then multiplied by the composite point award (expressed as a percentage) that has been assigned after consideration of the refiner's application.

This calculation results in a volume of allocated crude oil to which a refiner becomes entitled for an allocation period, pursuant to § 211.65(b).

[41 FR 21177, May 24, 1976]

RULING 1976-3—MANDATORY PETROLEUM PRICE REGULATIONS; PRODUCTION OF "NEW" CRUDE OIL DUE TO EXTRA DAY IN FEBRUARY, 1976; EFFECT ON CUMULATIVE DEFICIENCY REQUIREMENT AND BPCL ADJUSTMENTS

As provided in § 212.72, producers of crude oil may compute the base production control level ("BPCL") for

months beginning after January 31, 1976, either by selecting calendar year 1975 as the base year or by certifying crude oil sales for 1972 under § 212.131(a)(1) and thereby selecting calendar year 1972 as the base year. Producers which select 1975 as the base year determine the BPCL for each month by dividing the total number of barrels of crude oil produced and sold during calendar year 1975 by 365 (i.e., the number of days in that year) and multiplying the result by the number of days in the month in 1975 which corresponds to the month concerned. Producers using 1972 as the base year determine the BPCL by dividing the total number of barrels of crude oil produced and sold in calendar year 1972 by 366 (i.e., the number of days in 1972) and multiplying the result by the number of days in the month in 1972 which corresponds to the month concerned.

Producers using 1972 as the base year compare actual total amounts produced and sold during the 29 days of February, 1976, with the average daily production during 1972 multiplied by 29. Thus, output from like periods is compared and there are no anomalous results due to the extra day in leap years. However, producers using 1975 as the base year compare actual total amounts produced and sold during the 29 days of February, 1976, with the average daily production during 1975 multiplied by 28. Since an extra day's yield is included in the total amount produced and sold in February, 1976, compared with the BPCL for that month, producers which obtain "new" crude oil for February by exceeding the BPCL for that month might do so only because the BPCL was based on a "short month" consisting of 28 days of 1975's average daily production.

Producers in these circumstances may suffer one of two adverse consequences under a literal reading of 10 CFR Part 212, Subpart D. First, exceeding the BPCL for February only because of the extra day in February this year would trigger application of the current cumulative deficiency requirement. Pursuant to that requirement, subsequent monthly production and sale of crude oil which, on a cumu-

lative basis, fell short of the BPCL in any month after February would be required to be subtracted from the total amount produced and sold in the month concerned before determining whether the BPCL was exceeded for that month. Second, a property which exceeds the BPCL for February only because of the 29-day factor and which does not exceed the BPCL during the months, March through June, 1976, would be disqualified from the BPCL-adjustment program under § 212.76 for the period July 1-December 31, 1976.

These anomalous results were not intended under DOE regulations. DOE therefore interprets 10 CFR 212, Part D, as follows:

A property which exceeds the BPCL for the month of February, 1976, where the BPCL is based on calendar year 1975, will not be deemed to have exceeded the BPCL for that month, for the purpose of complying with the current cumulative deficiency requirement and qualifying for BPCL adjustments for the period July 1-December 31, 1976, under § 212.76, if the total amount of crude oil produced and sold from the property concerned during February, 1976, does not exceed 29/28 of the BPCL for that month.

The foregoing interpretation applies only for the purpose of complying with the cumulative deficiency requirement and qualifying for BPCL adjustments. This interpretation does not affect the right of a producer to charge upper tier prices for all amounts of crude oil produced and sold in February 1976, in excess of the BPCL as defined in § 212.72.

[41 FR 21942, May 28, 1976]

BULING 1976-3—NAVAL PETROLEUM RESERVES PRODUCTION ACT OF 1976; INTERPRETATION

The Naval Petroleum Reserves Production Act of 1976 ("the Act") which became law on April 5, 1976 (Pub. L. 94-258), provides, among other things, for commencement of production of crude oil within 90 days at maximum efficient rates from certain naval petroleum reserves, including the large Elk Hills Reserve in California. The Secretary of the Navy is directed to sell U.S.-owned petroleum production

from the reserves to the highest qualified bidder without regard to restrictions imposed by Federal, State or local price or allocation controls. The purpose of this ruling is to clarify certain questions which have arisen under the Act concerning the extent to which "petroleum" produced at these naval reserves is exempt from DOE price and allocation regulations.

Section 201 of the Act amends various provisions of Chapter 641—"Naval Petroleum Reserves" of Title 10 of the U.S. Code (10 U.S.C. 7420-7438). As amended, 10 U.S.C. 7430(b) reads—

Notwithstanding any other provision of law, each sale of the United States share of petroleum shall be made by the Secretary [of the Navy] at public sale to the highest qualified bidder, for periods of not more than one year, at such time, in such amounts, and after such advertising as the Secretary considers proper and without regard to Federal, State, or local regulations controlling sales or allocation of petroleum products.

The intent of Congress in amending this provision was explained in part as follows:

*** It is intended that the sales of petroleum from the reserves will continue to be at the highest bid price regardless of the current or previous distinction between "old" and "new" oil and would not be subject to Federal laws establishing ceiling or composite prices for first sales of domestic crude oil. (Conf. Rpt. 94-942, p. 27)

DOE thus interprets the price and allocation exemption provision of 10 U.S.C. 7430(b), as amended by section 201 of the Act, to apply only to the first sale of U.S.-owned "petroleum" by the Secretary of the Navy from the naval reserves concerned. All such first sales of crude oil are exempt from the ceiling price regulations of 10 CFR Part 212, Subpart D—"Producers of Crude Oil." Prices charged in subsequent sales (i.e., resales) of "petroleum" and in all sales of covered products refined in whole or in part from "petroleum" produced from the affected naval reserves, remain subject to DOE price controls except to the extent certain products are exempted under 10 CFR Part 212, Subpart C. Thus, the resale by the highest qualified bidder of crude oil purchased from the Secretary of the Navy is sub-

ject to the same DOE price regulations as any other resale (i.e., sale other than the first sale) of crude oil (10 CFR Part 212, Subpart F—"Resellers and Retailers"). The sale of covered products refined from such crude oil would likewise be subject to the same DOE price regulations as are all other sales of covered products by refiners (10 CFR Part 212, Subpart E—"Refiners"). It should be noted that both the Reseller and the Refiner price regulations provide for the dollar-for-dollar passthrough of the increased cost of crude oil, which would include the increased cost of crude oil produced from the affected naval reserves. Similarly, all subsequent sales or resales of "petroleum" and all sales of covered products refined in whole or in part from "petroleum" produced from the affected naval reserves are subject to DOE allocation regulations.

Section 201 of the Act states that "petroleum," as used in the Act, "includes crude oil, gases (including natural gas), natural gasoline, and other related hydrocarbons, oil shale, and the products of any such resources." It was further explained in the Conference Report that, for purposes of the Act, the term "gases" in the definition of "petroleum" includes, "gases of all kinds (natural gas, hydrogen, carbon dioxide, helium and any others)," and that the term "related hydrocarbons" in the definition of "petroleum" includes "tar sands, asphalt, propane, butane, etc." Conf. Rpt. 94-942, pp. 19-20, 24. It is therefore clear that certain petroleum products not specifically mentioned in the definition of "petroleum" in the Act (such as propane), which may be produced as a by-product or associated product in the production of natural gas or crude oil from the naval petroleum reserves are within the meaning of "petroleum" as used in the Act and the sale of such petroleum products by the Secretary of the Navy is exempt from price and allocation controls to the same extent that the sale by the Secretary of crude oil produced from the affected naval petroleum reserves is exempted by the Act.

Crude oil produced from the affected naval petroleum reserves will be eligible for inclusion in the volume of a

refiner's crude oil runs to stills for purposes of the domestic crude oil allocation program set forth in 10 CFR 211.67. In addition, since this crude oil may be sold by the Secretary of the Navy at market level prices, no entitlement obligations under § 211.67 will be in effect with respect to the inclusion of this crude oil in a refiner's crude oil receipts. Thus, for purposes of the entitlements programs it will be treated as imported crude oil.

[41 FR 21942, May 28, 1976]

RULING 1976-4—SYNTHETIC FUELS PROCESSED FROM OIL SHALE, TAR SANDS, AND COAL; INAPPLICABILITY OF MANDATORY PETROLEUM ALLOCATION AND PRICE REGULATIONS

I. ISSUE

The Department of Energy ("DOE") has recently received several inquiries with respect to the applicability of the Mandatory Petroleum Allocation and Price Regulations to the so-called synthetic fuels (or crude oil substitutes) processed from oil shale, tar sands, coal, and other natural deposits that must be mined before the crude oil substitute can be extracted. The purpose of this Ruling is to set forth the DOE's determination that such crude oil substitutes do not fall within the purview of DOE's authority to establish mandatory petroleum allocation and price regulations, which is derived from the Emergency Petroleum Allocation Act of 1973, as amended ("EPAA").

For purposes of this Ruling, oil shale is defined as:

A fine-grained sedimentary rock containing insoluble organic matter that yields substantial amounts of oil by destructive distillation.

Tar sands are defined as:

The several rock types that contain an extremely viscous hydrocarbon which is not recoverable in its natural state by conventional oil well production methods including currently used enhanced recovery techniques. The hydrocarbon-bearing rocks are variously known as bitumen-rocks, oil impregnated rocks, oil sands, and rock asphalt.

Coal is presently defined in 10 CFR Part 305.

II. RULING

The EPAA directs the President to promulgate regulations providing for the allocation and pricing of "crude oil, residual fuel oil, and refined petroleum products." The term "crude oil," however, is not defined and Congress did not specify in the Act or its legislative history whether it intended the term "crude production of such crude oil substitutes derived from oil shale, coal, tar sands or other natural deposits that must be mined before the hydrocarbons can be extracted. Accordingly, DOE has reviewed the purposes of the EPAA and the circumstances underlying its adoption to determine whether Congress intended the production of such crude oil substitutes to be subject to the specific temporary authority which Congress delegated to the President under the EPAA. Based on this review, the DOE has concluded that the Congress did not intend these products to be regulated under the EPAA.

In enacting the EPAA in December, 1973, Congress was concerned with providing temporary authority for the allocation and pricing of only those petroleum resources that were then actually or threatening to be in short supply. Thus, the purpose of the EPAA was stated in section 2(b) to be " * * * to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system." The temporary nature of the regulatory program envisioned by Congress under the EPAA was underscored by section 4(g)(1), which initially provided that the regulation required to be promulgated under section 4(a) would remain in effect only until midnight February 28, 1975.¹

The mandatory regulatory authority contained in section 4(a) has subsequently been extended on several occasions. See Pub. L. 93-511 (December 5, 1974), Pub. L. 94-99 (September 29, 1975), Pub. L. 94-133 (November 14, 1975), and Pub. L. 94-163 (December 22, 1975). The fact that this au-

Continued

At the time of enactment of the EPAA, domestic production of crude oil substitutes derived from oil shale, coal and tar sands was, as it is now, undertaken only for experimental purposes, and the synthetic products obtained thereby were not commercially available for use as refinery or petrochemical feedstocks and were not expected to become commercially available for several years. From these facts, the DOE has concluded that the Congress clearly did not intend these products to be subject to the temporary regulation required under section 4(a) of the EPAA when it enacted the EPAA to deal with the supply shortages and dislocations in the petroleum industry that occurred late in 1973 or threatened to occur before the end of February 1975.

The DOE recognizes that the initial price regulations of DOE (then known as the Federal Energy Office) defining the substances subject to price controls under the EPAA carrier forward, as the Congress contemplated would be the case, regulations having similar coverage that had previously been adopted by the Cost of Living Council ("CLC"). The CLC first provided for the regulation of petroleum prices on August 17, 1973, when it adopted Subpart L of 6 CFR Part 150, under Phase IV of the Economic Stabilization Program. CLC was acting pursuant to the authority conferred by the Economic Stabilization Act of 1970 ("Stabilization Act"), the broad purpose of which was to stabilize the economy, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar. The scope of regulatory authority exercised by CLC under the Stabilization Act was equally broad, extending generally to prices, rents, wages, salaries, dividends, and interest.

The Subpart L regulations of CLC were applicable to "sales of products described in the 1972 Standard Industrial Classification Manual, Industry

Code 1311, 1321, or 2911 (except natural gas * * *) * * *." The applicability of the CLC Subpart L regulations to the production segment of the petroleum industry was described by Standard Industrial Classification 1311 (except natural gas), which provides, in part, as follows:

Establishments primarily engaged in operating oil and gas field properties. Such activities include exploration for crude petroleum and natural gas; drilling, completing, and equipping wells; operation of separators, emulsion breakers, desilting equipment; and all other activities in the preparation of oil and gas up to the point of shipment from the producing property. This industry also includes the production of oil through the mining and extraction of oil from oil shale and oil sands. * * *

Crude oil production
Crude petroleum production
Natural gas production
Oil sand mining
Oil shale mining

(Standard Industrial Classifications 1321 and 2911 relate to Natural Gas Liquids and Petroleum Refining, respectively.)

In passing the EPAA, Congress expressly recognized that the CLC petroleum price regulations in Subpart L could form the basis for the price regulations to be adopted under the EPAA, unless and until such time as the purposes of the EPAA required a modification:

It is expressly contemplated * * * that the price controls established by Phase IV under authority of the Economic Stabilization Act would continue in effect unless and until required to be modified by the price regulation required to carry out the purposes of this Act. * * * (H.R. Rep. No. 628, 93rd Cong., at 26 (1973).)

Congress' contemplation that CLC price controls "would continue in effect unless and until required to be modified" under the EPAA indicates that Congress expected the mandatory authority under the EPAA to be generally coextensive with the scope of the authority exercised by CLC under the Stabilization Act. But it also indicates that the agency assigned responsibility for implementing the EPAA would be under an obligation to take a closer look at the CLC's regulations in order to conform their scope to the

authority has been extended beyond the initial February 28, 1975 expiration date, however, is not relevant to the intent of Congress with respect to the meaning of the term "crudeoil" at the time the EPAA was passed.

specific temporary regulatory purposes of the EPAA.

Accordingly, FEO on April 3, 1974, determined that certain products refined from crude oil, which were specifically included under the Standard Industrial Classification 2911 and thus were price controlled by the CLC under the Stabilization Act, were not within the intended scope of the EPAA (39 FR 12353, April 4, 1974). No action was taken at that time with respect to the crude oil substitutes which are the subject of this ruling inasmuch as they were not being commercially produced and were thought therefore not to warrant specific mention. However, now that the matter has been appropriately brought to the DOE's attention and the agency has had an opportunity to consider whether Congress intended these products to be subject to regulation under the EPAA, the DOE for the reasons outlined above, has concluded that Congress did not so intend.

[41 FR 25886, June 23, 1976]

RULING 1976-5—RETAIL SALES OUTLET OPERATOR'S ENTITLEMENT TO MOTOR GASOLINE

Facts. Firm A operates five branded retail sales outlets of motor gasoline. Each outlet has traditionally offered customers not only gasoline, but also lubricants, automobile accessories, including tires and batteries, and the services of a mechanic. As part of a change in marketing operations, Firm A is planning to remodel all of its stations and to offer self-service sales of gasoline only. Firm A will operate the stations under a different brand name than the name currently used. None of the other goods and services now offered will continue to be offered once the newly remodeled stations are put into operation. The changeover will require the closing of the stations for two months.

In addition to the five branded retail sales outlets it operates as described above, Firm A also leased one non-branded retail sales outlet to Firm B. Firm B operated the retail sales outlet as a "full service" station until June 30, 1976. On that date, the lease expired and Firm A chose not to renew the lease. Firm B did not attempt to open another retail sales outlet. Firm

A occupied the site and immediately made preparations to convert the station to "self-service" only, consistent with its overall marketing operations.

Firm C, an independent, non-branded wholesale purchaser-reseller of motor gasoline, operated one retail sales outlet of motor gasoline until June, 1974, when Firm C went out of business and closed the station. The building and land comprising the station's site were sold to Firm D, which planned to erect an office building on the site. Firm D razed the building in preparation for the new construction. However, after experiencing delays for several months in making final arrangements with contractors, Firm D abandoned its plans to erect an office building and instead built a service station which it now wishes to operate as a non-branded independent marketer. The station will offer the same services as the station formerly operated on the site by Firm C.

Issues. (1) After remodeling its five retail sales outlets and changing marketing operations, will Firm A be considered a new wholesale purchaser-reseller at each station site?

(2) After taking over the retail sales outlet from its former tenant and changing its marketing operations, will Firm A be considered a new wholesale purchaser-reseller at that station site?

(3) Is Firm D considered a new wholesale purchaser-reseller at the site formerly occupied by Firm C?

Ruling—Issue (1). The Mandatory Petroleum Allocation Regulations state that

[e]ach firm or part of a firm which operates an ongoing business at a retail sales outlet shall be considered a separate firm with respect to each such outlet for purposes of [the motor gasoline allocation regulations] and, therefore, shall be a separate wholesale purchaser-reseller. 10 CFR 211.106(b)(1).

The regulations further provide that

[a] wholesale purchaser-reseller which operates a retail sales outlet shall be deemed to have gone out of business with respect to that outlet . . . if it vacates the site on which it conducts such business. 10 CFR 211.106(c)(1).

Whether a particular retail sales outlet has gone out of business de-

pends upon the facts in each case. However, in those instances where as part of an overall plan to alter marketing techniques, a marketer changes its retail outlets from traditional service stations to high volume sales outlets only, the remodeled stations would not be considered "new" retail sales outlets. It is true that a self-service station may very well appeal to a different type of customer than one who frequents the traditional outlet. However, the fact that different customers will be attracted to the remodeled, high-volume station does not lead to the conclusion that a new business has been established at the site of the old station. Retail sales of motor gasoline were conducted prior to and after the change in marketing.

Therefore, the operator of such a retail sales outlet, such as Firm A, is deemed to be conducting an on-going business and is not a new wholesale purchaser-reseller at the site of the old station.

Because Firm A is not a new wholesale purchaser-reseller, it may not apply for assignment of a supplier and base period volume as provided by 10 CFR 211.12(e). Each remodeled outlet which Firm A operates is entitled to the same quantities of motor gasoline it had a right to purchase under the Mandatory Petroleum Allocation Regulations prior to the changeover to gasoline sales only method of operations.

If Firm A wishes to obtain greater quantities of motor gasoline to be offered for sale to the public, it may take two steps. It may purchase surplus motor gasoline under 10 CFR 211.10(g). Firm A should bear in mind that § 211.10(g)(5) restricts a supplier from distributing surplus product through its owned and operated outlets until the supplier's purchasers who are independent marketers have been afforded the opportunity to purchase surplus product in an amount determined in accordance with 10 CFR 211.10(g)(5).

Firm A may also under 10 CFR 211.13(e) seek an exception to DOE's regulations to provide an adjustment to base period use for each retail sales outlet. Requests for exception should be prepared in accordance with Sub-

part D of Part 205 (Administrative Procedures and Sanctions, 10 CFR 205.50 et seq.).

Issue (2). The Mandatory Petroleum Allocation Regulations provide that

... [w]henver a wholesale purchaser-reseller of motor gasoline is deemed to have gone out of business ... the right to an allocation with respect to the retail sales outlet shall be deemed to have been transferred to its successor on the site, provided such successor established the same ongoing business on the site within a reasonable period of time, as determined by DOE, after its predecessor vacates the premises. 10 CFR 211.106(e).

Thus, when Firm B's lease expired and Firm A succeeded Firm B on the site, Firm B's entitlement was transferred to Firm A. The transferee on the site may be engaged in a new business, but it is not a new wholesale purchaser-reseller for purposes of the Mandatory Petroleum Allocation Regulations, since it is considered to be the continuation of an already existing entity. The amount of the entitlement at the site does not increase upon transfer. Hence, the amount of Firm A's entitlement will be the same as what it would have been if Firm B were still operating the retail sales outlet. Firm A would not have a right to an increased entitlement simply because it plans to modify the marketing operation at the site. Modifying the mode of marketing does not change the nature of the business, which is the retail sale of motor gasoline. As previously discussed, Firm A could supplement its entitlement by purchasing surplus motor gasoline pursuant to 10 CFR 211.10(g) or by seeking an adjustment to its base period use in accordance with 10 CFR 205.50 et seq.

Issue (3). The situation presented by Firm D is significantly different from that presented by Firm A. The intent of the parties was clearly to cease operations of a retail gasoline sales outlet on the site. Firm C went out of business; Firm D razed the building and initially intended to erect a new building for purposes completely unrelated to the retail sale of motor gasoline. A relatively long period of time passed before Firm D changed its intention and built a new station. Under these circumstances Firm D may apply

for assignment of a supplier and base period use pursuant to 10 CFR 211.12(e). Assignment of a base period supplier and determination of the station's base period use will be made by DOE in accordance with the "Guidelines for Evaluation of Applications for Assignment of Supplier and Base Period Use to New Gasoline Retail Sales Outlets" (40 FR 20342; May 9, 1975).

As in the case of Firm A, Firm D may operate its new station using surplus product. Of course, Firm D would not establish any supplier/purchaser relationship with the supplier of surplus product, nor would Firm D establish a base period use if it relied on the purchase of surplus gasoline to operate its retail sales outlet without requesting the assignment of a base period supplier.

[41 FR 36647, Aug. 31, 1976]

RULING 1977-1—CLARIFICATIONS TO MANDATORY PETROLEUM PRICE REGULATIONS APPLICABLE TO DOMESTIC CRUDE OIL

I. BACKGROUND

On April 13, 1976, the Department of Energy ("DOE") gave notice (41 FR 16179, April 16, 1976) of a proposed rulemaking and public hearing to consider clarifications to certain technical aspects of the Mandatory Petroleum Price Regulations applicable to domestic crude oil (10 CFR Part 212, Subpart D).

The DOE did not propose in that rulemaking proceeding to alter any of the major policy decisions already reached or under consideration, in the three rulemaking stages to implement the crude oil pricing policies of the Energy Policy and Conservation Act ("EPCA," Pub. L. 94-163). Rather, the purpose of the rulemaking proceeding was to resolve as many as possible of a variety of more technical subsidiary issues that had arisen in connection with the implementation of the EPCA. These issues included those related to the definition of "property" and "posted price"; whether a well is properly classified as an "oil well" for purposes of the stripper well property rule; the partial rescission and modification of Ruling 1975-15, including the issue whether a property's producing

patterns have been "significantly altered" for purposes of the enhanced recovery rule applicable to unitized properties (10 CFR 212.75); and whether the certification of domestic crude oil sales required in 10 CFR 212.131 was adequate to enable crude oil purchasers to report on the Form DOE-P124-M-O, Domestic Crude Oil Purchaser's Monthly Report, notice of which was also issued on April 13, 1976.

In the April 13 Notice, DOE set forth tentative conclusions with respect to these issues and solicited comments to aid DOE in resolving these issues in a way that would best comport with the statutory objectives of the EPCA. DOE indicated that primary consideration would be given to interpretive rulings and clarifying amendments (if needed) that would be both administratively feasible and consistent with obtaining optimum production of crude oil in the United States. After receiving written comments and oral statements, DOE issued on August 20, 1976 a Notice entitled "Clarifications to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil" (41 FR 36172, August 26, 1976), setting forth DOE's determinations with respect to those issues, and adopting certain regulatory amendments designed to improve the incentives offered under the two tier pricing system. The purpose of this Ruling is simply to set forth in the format of a Ruling the DOE interpretations, which were initially set forth in the August 20 Notice, of certain regulatory definitions as they existed since first adopted by the Cost of Living Council. This action is being taken to eliminate possible questions concerning the legal significance of the August 20 clarifications.

II. THE DEFINITION OF "PROPERTY."

A. Outline of Common Legal Relationship in Crude Oil Production.

"This Ruling sets forth verbatim only the interpretive portions of the August 20 Notice, and the section headings have been revised accordingly. Differences between this Ruling and the interpretive portions of

Continued

Before discussing the purpose and intent of the crude oil pricing regulations and the definition of "property," a brief outline of the general nature of the legal relationships pursuant to which crude oil is typically produced should prove helpful in affording a better understanding of the issues involved.

Crude oil which can be commercially produced generally must be found in underground reservoirs² which have trapped a sufficient quantity of marketable crude oil to make production economically feasible. The nature of the interests which may exist in crude oil is extremely complex. In the simplest case, the owner of land in fee is generally entitled to produce and dispose of any crude oil which may be recovered by wells on that land. This right is not unqualified, however, but is subject to laws and regulations, which have been adopted in various states for conservation and other purposes, and to various legal doctrines which have evolved with respect to protection of the correlative rights of other parties, such as adjoining landowners, that may be affected by the landowner's production of crude oil.

In the typical case, however, the landowner does not exercise the right to produce crude oil which is inherent in the fee interest; rather, the various rights, powers, privileges, and immunities associated with the ownership of land in fee (and the crude oil which may be recovered therefrom) are transferred or otherwise divided among several parties. Although the nature of the interests which may be created by such transaction is virtually limitless, certain principal rights have been grouped together with sufficient frequency that they may be generally described as follows:

- (a) Mineral interests,
- (b) Royalty interests, and
- (c) Leasehold interests.

the August 20 Notice, other than obvious changes in the references to the rulemaking proceeding initiated by the April 13 Notice, are referenced in subsequent notes.

²The reference to "geological formations" has been deleted as possibly confusing because a similar term is subsequently used to refer to more than a single reservoir.

Thus, the owner of the land may grant to others (or reserve to himself) the right to go upon the land and remove therefrom the crude oil (or other minerals) which may be found beneath the surface, thus separating this right (the "mineral interest") from the balance of rights otherwise appurtenant to the ownership of land.

The owner of the mineral interest may, in turn, execute what is generally known as an oil and gas lease, which typically conveys the right to go upon the land for the purpose of prospecting for and producing crude oil (the "leasehold interest"). Such leases are typically for a term of years, subject to extension in the event crude oil is produced from the land during the term described in the lease. In consideration for receiving such a "leasehold interest," the lessee usually agrees to deliver to the lessor free of cost a share of the crude oil produced from the land (said to be taken by the lessor "in kind"), or a share of the proceeds of such crude oil produced and sold from the land. This right typically retained by the holder of the mineral interest to a share of production or proceeds is described as a "royalty interest." (See generally 1 H. Williams and C. Meyers, *Oil and Gas Law* sections 101, 201-202 (1975 Supp.), hereinafter cited as "Williams and Meyers.") An oil and gas lease may be described as follows:

The basic document of the oil and gas industry is the lease which authorizes an operator, the lessee or his assignee to enter upon described premises for the purpose of exploring for and developing the mineral resources in the premises. * * *

The modern oil and gas lease is the product of conflicts between the landowner and the operator of the oil and gas interest. The operator has been desirous of securing a lease with a small capital investment, keeping the lease as long as it was productive or was valuable for speculative purposes, and at the same time, being able to terminate an unprofitable lease without liability to the lessor. The landowner has been interested primarily in obtaining royalties from the lease and therefore has pressed for immediate exploration and development operations. In lieu of exploration and development operations, the lessor has tried to secure a periodic return for the holding of the leasehold interest. However, he has also wanted to limit the time the lessee can post-

pone drilling by periodic payments, in order to prevent the lessee from holding the lease merely for speculation, and to assure the exploration and development of the lease within a short time, (3 Williams and Meyers section 601, at 1-2.)

B. Regulatory Background. The two tier pricing system was proposed on July 19, 1973 (38 FR 19464, July 20, 1973), by the Cost of Living Council ("CLC") under authority of the Economic Stabilization Act of 1970, as amended. In proposing the two tier system, CLC stated:

The Council recognizes a need to stimulate increased production and is proposing a system which allows increased production (new crude petroleum) from each producing property and an equal amount of the current production (old crude petroleum) to be sold without respect to the ceiling price rule. Adoption of this incentive plan creates a two-tier pricing system for crude oil, which requires posting of two sets of prices, one for "old oil" and one for "new oil." Postings for "old oil" can be no higher than the ceiling price and postings for "new oil" is [sic] at the buyer's discretion.

A crude oil producer is required to probate among all his "old oil" buyers the amount of "old oil" freed from ceiling limitations by the production of a like amount of "new oil." (38 FR 19467.)

The regulations proposed on July 19 did not include a definition of the term "property," but defined "base production control level" (i.e., the level above which a property's current production and sale would qualify as "new oil") as follows:

"Base production control level" for a particular month means—

(i) For a particular property on which the producer has leased production rights, the total number of barrels of domestic crude petroleum produced in the same month of 1972 from that property.

(ii) For a particular property on which the producer owns production rights, the total number of barrels of domestic crude petroleum produced in the same month of 1972 from that property. (38 FR 19482.)

In adopting the two tier pricing system on August 17, 1973 (effective August 19, 1973 (38 FR 22536, August 22, 1973)), CLC indicated:

A 2-tier price system has been adopted, providing for a ceiling on domestic crude petroleum prices but allowing new crude and an equivalent amount of old crude to be sold

at prices above the ceiling * * * (38 FR 22536.)

CLC also stated:

* * * The substantive policy changes [between the July 19, 1973 proposal and the August 17, 1973 final regulations] were publicly announced on August 10. These regulations implement those policy decisions and, in addition, incorporate numerous changes to better implement the program. (38 FR 22536.)

The August 10 public announcement referred to above was in the form of a press release issued by CLC, stating that with respect to the two tier pricing system.

The Council has been very concerned that the final regulations strike a balance between constraining prices while at the same time encouraging the necessary increase in supplies which the country must have. * * *

The press release explained the two tier pricing system as follows:

Rule. A two-tier pricing system is provided. Producers will have the opportunity to sell "new oil"—that above 1972 production levels—at free market prices.

Reason. The two-tier pricing system which allows new oil to be sold at higher prices than "old oil" is expected to stimulate domestic crude oil production while maintaining price controls on oil presently being produced. The two-tier system will encourage increased investment in domestic exploration and will provide an economic incentive to allow the recovery of a larger percentage of oil in existing reservoirs. (2 Historical Working Papers on the Economic Stabilization Program August 15, 1971 to April 30, 1974, at 1259-80.)

There was no discussion of the term property in the preamble to the final regulations, but a definition of property was included in 6 CFR 150.354 of the August 17, 1973 final regulations, as follows:

"Property" is the right which arises from a lease or from a fee interest to produce domestic crude petroleum. (38 FR 22538.)

Thus, from the very inception of the two tier pricing system, producers were required to measure current monthly production and sale of crude oil from a "property" against the amount of crude oil produced and sold from that same "property" in the same month of 1972, in order to determine the amount of current crude oil

production which would be subject to the ceiling price rule.

CLC did not elaborate on the rationale for the two tier price system, beyond the statements quoted above concerning the need to constrain prices while at the same time encouraging increased production. Thus, CLC perceived its statutory objective as primarily to control inflation with what was envisioned to be a short-term program under authority of the Economic Stabilization Act of 1970. That Act was scheduled to expire, as it did, eight months later, on April 30, 1974. (Thus, for example, CLC began sector-by-sector decontrol on October 25, 1973.) DOE noted in the April 13 Notice with respect to this consideration that

Because the Economic Stabilization Program was always intended to be a temporary program, the regulations adopted pursuant to that program were designed so as to achieve the price control regulatory objectives with minimal disruption to normal business practices. Thus, a definition of property was adopted to serve two basic purposes. First, the entity was intended to be one for which producers would in their normal course of business maintain production records so that new recordkeeping or data collection by the producers would not generally be necessary and audits for compliance purposes would be facilitated. Second, the entity was designed to serve as the basic building block for the incentive system which rewarded increased or new production from a property by classifying that production as new crude oil. (41 FR 16180.)

It should be noted also that the concept of a "current cumulative deficiency" was also incorporated in the two tier pricing system from the outset. (Once new crude oil had been produced and sold from a property, and current production and sale then fell short of 1972 production and sale levels, new crude oil could not thereafter be sold from the property until enough production in excess of 1972 levels had been sold at the ceiling price even though it would otherwise have qualified as new crude oil but for the requirement to make up the cumulative deficiency.) However, the cumulative deficiency rule was not a significant factor in the early months of the two tier system, since production and sale levels in late 1973 were, in gener-

al, not significantly less than 1972 levels.

C. Legislative Background. The term "property" gained further significance under the crude oil pricing regulations with the advent of the statutory exemption from those regulations of the first sale of crude oil produced from stripper well leases, which was initially provided for by the Trans-Alaska Pipeline Authorization Act ("TAPAA," Pub. L. 93-153), signed by the President on November 16, 1973. The exemption was implementation by CLC by an amendment to its regulations, which was issued November 21, 1973 and made effective as of November 16, 1973 and made effective as of November 16, 1973 (38 FR 32494, November 26, 1973). The amendment defined "stripper well lease" to mean a "property" (as previously defined in the two tier crude oil pricing regulations) whose average daily production did not exceed the qualifying limits set by the statute. In so doing, CLC stated:

... For purposes of this exemption, the term "property" is described as being co-extensive with that "property" used to determine 1972 base production control levels, as measured by leases in existence in 1972. This narrow definition was adopted in order to comply with the Congressional intent expressed in the Conference Report which stated that the "Congress specifically intends that the regulations shall, among other things, prevent any 'gerrymandering' of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings" (H.R. Rep. No. 93-624). (38 FR 32496.)

On November 27, 1973, the Emergency Petroleum Allocation Act of 1973 ("EPPA," Pub. L. 93-159) was enacted and it modified the test for stripper well lease qualification from one based on production levels during the preceding calendar month to one based on production levels during the preceding calendar year. A corresponding change in the crude oil pricing regulations was made by CLC, effective November 27, 1973 (38 FR 34464, December 14, 1973), but in all other respects the definition of stripper well lease remained as initially adopted.

Section 4(e)(2) of the EPAA provided for the stripper well lease exemp-

tion (until its repeal, effective February 1, 1976, by the Energy Policy and Conservation Act and read in part, as follows:

(A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

Neither the EPAA nor the TAPAA included a definition of the term "lease." The most extensive legislative history concerning the original stripper well lease exemption is found in the Conference Report accompanying the TAPAA.

Although the Conferees did not discuss the meaning of the term "lease," they did state:

The Congress intends that the provisions of this section will be strictly enforced and regulated by the administering agency to insure that the limited exemption of this class of wells for the express purposes described above is not in any way broadened . . . Congress also directs that the administering agency shall promulgate regulations to implement the provisions of this section before it becomes operative. The Conferees expect the administering agency to utilize State data regarding production volumes, and to provide by regulation safeguards against the manipulation of gerrymandering of lease units in a manner that evades the price control and allocation programs.

These regulations shall be so designed as to provide safeguards against any abuse, over-reaching or altering of normal patterns of operations to achieve a benefit under this section which would not otherwise be available. Congress specifically intends that the regulations shall, among other things, prevent any "gerrymandering" of leases to average down high production wells with a number of low production stripper wells to remove the high production wells from price ceilings. The sole purpose and objective of this section 406 is to keep stripper wells—those producing less than ten barrels per day—in production and to insure that the crude oil they produce continues to be available for U.S. refineries and U.S. consumers. It is not intended to confer any benefit on the owners and operators of wells producing in excess of ten barrels per day.

The Congress also intends that the regulations provide appropriate limitations and provisions in the definition of "lease" to insure that an administratively workable system is established which does not permit abuse. (Emphasis in original, H.R. Rep. No. 624, 93d Cong., 1st Sess. at — (1973).)

The TAPAA stripper well lease exemption originated with a floor amendment that was introduced by Senator Bartlett of Oklahoma. The original text of the amendment provided that:

Those oil leases whose average daily production per well does not exceed that of a stripper well of not more than ten barrels of oil per day shall be exempt from any allocation or price restraints. . . . (119 Cong. Rec. S13432 (daily ed. July 14, 1973).)

In explaining this amendment Senator Bartlett stated:

So if the stripper producer had production that did not qualify, he, of course, would not be in any position to have that production exempted from price controls. It is done on a lease basis, because normally all the wells on one lease go into one tank or on a several tank basis. So if it is from a big well, the average goes away [sic] up.

Incidentally, when subsidies were put on [stripper well production] during World War II, that went beyond just a lease basis; that was done on a field basis, because it is easier to do all the accounting that way. But in this case, it is only decided on a lease basis. (Id. at S13435, remarks of Senator Bartlett.)

It should be noted also that the sponsor of the amendment understood stripper wells typically to be operated by independent producers pursuant to a lease:

Large oil companies have few stripper wells. Because of their higher operational costs, major oil companies are forced to sell their leases to independents—who can operate these leases for a longer period. (Id. at S 13432.)

The legislation which became the Emergency Petroleum Allocation Act of 1973 ("EPAA") originated in the Senate where a bill was passed on June 5, 1973, containing no stripper well provision of any kind. When the House passed a similar version of the emergency petroleum allocation measure on October 17, 1973, it contained a "stripper" exemption applicable to wells rather than to leases. In the

Conference Report of November 10, 1973, a stripper well lease provision was substituted, without comment, and this provision was subsequently adopted by Congress in the final version of the EPAA without debate or comment on the meaning of "leases."

The general legislative silence on the meaning of stripper well "leases" in connection with the drafting and passage of the EPAA can therefore be explained only by the fact that this matter was decided largely in connection with the TAPAA companion measure. These two statutory stripper well lease provisions, although identical insofar as the concept of "leases" is concerned, contained certain technical differences. Because of the use of the same language in both enactments concerning "leases," however, the legislative history of the TAPAA is relevant and applicable to the meaning of stripper well "leases" under the EPAA and the implementing CLC, FEO, and DOE regulations.

D. Changes Since Adoption of the Two Tier Crude Oil Pricing System. Several important changes in circumstances have occurred since the initial definitions of "property" and "stripper well lease" were adopted. First, with the passage of time, the natural decline in the rate of production has operated to make the cumulative deficiency provision of the two tier pricing system increasingly more significant. Second, the initial emphasis of CLC on restraining prices and controlling inflation has tended to be of lesser significance compared with the need to provide effective incentives for increased domestic production of crude oil. Third, the price differential between "old crude oil" and crude oil not subject to the ceiling price limitation has increased dramatically, from modest initial levels of \$.50 per barrel or less, to amounts of \$7.00 per barrel or more. The "old crude oil allocation" or "entitlements" program was instituted in response to this increased price disparity, and since November, 1974, refiners have been required to have an "entitlement" to refine a barrel of old crude oil, with those refiners having more than the national average of old crude oil generally required to purchase such entitlements

from refiners having less than the national average of old crude oil. Finally, enactment of the EPCA on December 22, 1975, effectively, changed the crude oil pricing program from one which was expected only to be temporary to one which would be mandatory for at least 40 months.

The amendments to the crude oil pricing regulations adopted to implement the crude oil pricing policies of the EPCA are intended to reflect these changed circumstances. Under the two tier pricing system as revised effective February 1, 1976, existing cumulative deficiencies were eliminated for all properties. Also, provisions were subsequently added to take into account the natural rate or production decline in future months, so that the level of production which must be exceeded before crude oil produced from a property may be sold at upper tier prices (the "base production control level") may be adjusted downward at six month intervals. These provisions were added to help keep the incentive of higher, upper tier prices within the reach of producers of most properties, so that measures taken to increase rates of production could realistically be expected to result in upper tier prices without regard to the time that has elapsed since the initial base production control levels were first established. Also, the "released crude oil" provisions which were included in the initial two tier pricing system as a special incentive for increased production in the short term were eliminated on a prospective basis, and base production control levels are now determined with reference to the average monthly volume of "old crude oil" produced and sold from each property in 1975.

E. General Considerations. Because the considerations involved with respect to past applications of the term "property" are significantly different from the considerations involved in prospective applications of the term, DOE has concluded that the clarifications that are appropriate with respect to past applications of the term are likewise different from those which are to be applied on a prospective basis. With respect to past interpretations DOE is, of course, bound to formulate those clarifications which are

most consistent with the purpose and intent of the regulations in effect during that time, whereas with respect to future applications of the term, DOE enjoys greater latitude to make such prospective adjustments in the meaning of the term as will best suit the current objectives of the two tier pricing system.

In seeking at this time to clarify the meaning of a term that has been so widely applied for almost three years, DOE has sought, first, to determine the legal significance of the words used to define the term and, second, to identify and evaluate the extent to which other factors (extrinsic to the language of the definition itself) may have made it inequitable or impracticable to apply the literal meaning of that definition in certain circumstances. With this intention, and based upon the comments received in response to the April 13 Notice, therefore, DOE has concluded that the literal meaning of the term "property," as defined by DOE, is generally to be understood as synonymous with the physical "tract" or "premises" as to which a working interest is established by an oil and gas lease, or by a fee interest. It has also concluded that in certain instances it is permissible to segregate the interest so described for purposes of delineating an DOE "property," while in other instances the aggregation of such interests to form a single DOE "property" is appropriate.

The conclusion that the term "property" (i.e., "the right which arises from a lease or from a fee interest to produce domestic crude petroleum") is, in the strictest sense, generally synonymous with the tract or premises as to which a right to produce exists pursuant to an oil and gas lease or a fee interest, is based in large measure on the foregoing review of the history of these concepts.

Although the evidence is not unambiguous, DOE has concluded that CLC by its definition of the term "property" intended to refer to the premises described in the oil and gas lease pursuant to which crude oil was being produced. It also appears that this is the reasonable meaning of the definition that CLC used and that the definition should have been so under-

stood. Thus, when CLC first proposed the two tier concept, it described the productive entity with respect to which production was to be measured as "a particular property on which the producer has leased production rights." Use of the phrase "property on which" suggests that CLC contemplated that crude oil production would be measured according to the surface acreage, or "tract," as to which a producer had obtained production rights through an oil and gas lease. (Such leases typically describe the premises by surface boundaries, although they may also delineate particular underground strata as to which rights are conferred. (See, e.g., 3 Williams and Meyers section 665.))

When the two tier pricing system was adopted, property was defined, as noted above, as "the right which arises from a lease of from a fee interest to produce domestic crude petroleum." The term "lease" has been generally defined, for purposes of oil and gas law, as "[t]he instrument by which a leasehold or working interest is created in minerals. * * * Williams and Meyers, Manual of Oil and Gas Terms at 240-241 (3d ed. 1971). "Working interest" has been defined, in turn, as "[t]he operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land. * * * (Id. at 511.)

Inasmuch as the lease is the basic document of the oil and gas industry, there should have been no doubt but that CLC intended by its definition of property to signify the premises described by an oil and gas lease (or by a deed, in those comparatively few instances in which the operator was also the owner of the mineral interest).³

³This statement, which appeared in the August 20 Notice, has given rise to questions concerning its consistency with the statement in the text at note 4 *infra*. The above statement concerning the intended meaning of the CLC definition was made with reference to what DOE regarded as the vast majority of instances. It was not meant to preclude the possibility that, in certain instances, as discussed more fully in the text beginning at note 4 *infra*, there would have been considerable doubt as to the intended meaning of the term.

DOE believes that this term, which has generally uniform historic meaning throughout the crude oil production industry, was used initially with the intention and expectation that it would provide a uniform basis for application of price controls throughout the industry and would avoid the need for taking into account the varying state regulatory concepts and internal systems of accounting.

Also relevant to the intent with which CLC used the term is that the concept of released crude oil was specifically designed as an incentive to increased production over a relatively short time. The fastest means of increasing production was through maximum exploitation by producers of tracts subject to their working interests—whether by application of enhanced recovery techniques, re-working of wells, or by re-completion of wells in new producing formations. The treatment, for example of separate reservoirs subject to the same oil and gas lease as separate properties would have been inconsistent with the objective of the released crude oil concept to provide producers with maximum incentives to exploit to the full extent the tracts which were subject to their existing rights to produce crude oil.

The evidence with respect to the legislative treatment of the term "lease" is not inconsistent with this conclusion. DOE's review of the legislative history of the stripper well lease exemption indicates that the sponsor of the stripper well lease exemption used the "lease" as the unit of measurement simply because the production of several wells subject to a single lease is commonly commingled in one or more storage tanks. He proposed that the stripper well exemption be "decided on a lease basis," rather than on some other basis, solely because of the practical necessity inherent in the common collection and storage systems in use. Thus, a well-by-well measurement would not normally be possible on the one hand and, on the other hand, averaging per-well production across an entire field, to the extent a field "went beyond" or was broader in scope than a lease, was presumably not desirable because it would in some cases

have unnecessarily expanded the scope of the exemption to leases that were not marginal and in other cases would have unnecessarily prevented marginal leases from benefitting from the exemption. The term "lease" therefore appears to have been regarded as the most appropriate term available to describe an interest that would typically encompass more than a well" but less than a "field." It also appears that the term was regarded to be commonly understood as no definition was included in the Act.

However, notwithstanding the strong support, both in the legislative history and elsewhere, for a literal interpretation of the definition of property, DOE has determined that the clarification of past applications of the property concept should recognize more flexibility because of a variety of circumstances under which an interpretation of the term property that was limited to the literal meaning of the language of the definition would be inequitable.⁴ Several considerations led to this conclusion.

As noted in the foregoing review of the concept of property and its significance under the two tier price system, the term "property" was first defined in regulations which were issued on August 17, 1973, and became effective on August 19, 1973. Thus, producers were required immediately (i.e. by the end of August) to apply the new definition to their particular circumstances to determine whether any "new" or "released" crude oil had been produced from a property in that month. While the definition of the term appears to have been premised on the assumption that it would provide a common and easily-understood basis for delineating appropriate productive entities, comments received in this and other proceedings indicate that there have, in fact, been many differing interpretations of the meaning of the term among producers.

With respect to the extent to which differing and possibly conflicting interpretations of the term should be recognized by DOE as consistent with the regulations, it must be recognized

⁴See note 3 supra.

that producers had no detailed guidance initially from CLC, FEO, or DOE with respect to the numerous questions that arose with respect to the property definition. The first ruling on the definition of property was not issued until August 29, 1975 (DOE Ruling 1975-15, 40 FR 40832, September 4, 1975). Further, when the CLC definition of property had to be adapted by producers to their particular circumstances in August 1973, the benefits or detriments of alternative approaches, to the extent they may have been considered, would have been perceived much differently than at a later time.

It should be recognized, for example, that the two tier pricing system initially operated generally to provide an economic incentive for the aggregation of productive entities if one such entity was capable of producing significantly higher volumes of crude oil than it produced in 1972. This is because there had not been time for significant current deficiencies to accumulate as to most productive entities, and the increased production from one entity, if sufficient would serve under the special release rule to release from the ceiling price rule crude oil from other productive entities only if they were treated as part of the same property. Of course, to the extent that any cumulative deficiency had accrued at that date, selective segregation of entities would have served immediately to result in all "new crude oil" from any separate entity with respect to which production was just being initiated. As a general matter, however, it seems unjust, with the benefit of hindsight, to ascribe now improper motivations to applications of the property concept which were made under considerably different circumstances nearly three years ago.

Also favoring a more flexible interpretation of past applications of the term property is the reality of several significant consequences attached to the determinations that have been made with respect to the meaning of the term "property." Volumes of "old," "new," "released," and "stripper well lease" crude oil are a function of the scope of the "property" as determined by the producer. "Old" crude

oil volumes, thus determined, have been certified, and entitlements have been purchased by refiners with respect to such volumes. The costs of the crude oil and entitlements to refiners have, in turn, generally been passed through in price charged for refined products. Revenue paid to producers have, in like manner generally been used to pay operating costs or to initiate enhanced recovery of new exploration and development, and remitted to royalty owners or otherwise disposed of. In addition, since February 1, 1976, the "base production control level" of each property has been defined by reference to the volume of "old crude oil" produced and sold from the property concerned during 1975.

DOE recognizes the substantial reliance that has been placed on these determinations by numerous parties, that there is no basis for concluding in general that such determinations were other than good faith attempts to comply with the regulations, and that there is a substantial need for a measure of administrative finality to attach to as many of these determinations as possible, so as to avoid substantially disruptive retroactive adjustments.

The legislative history of congressional intent with respect to the meaning of "lease" in the context of the stripper well lease exemption is not inconsistent with the need to afford some measure of flexibility in the definition of the term "property." The Conference Report accompanying the TAPAA states that "Congress . . . intends that the regulations provide appropriate limitations and provisions in the definition of 'lease' to insure that an administratively workable system is established which does not permit abuse." This statement clearly indicates that rigid adherence to a "lease" system was not expected and that the necessity for some degree of flexibility in defining the term was acknowledged. Consistent with this intent, the regulatory definition of a stripper well lease provided for, among other understandable exercises in flexibility, inclusion of "fee interests" within the meaning of the statutory term "lease."

The strictures in the Conference Report on the subject of stripper well "gerrymandering" do not contradict

this view. The only express qualification on administrative flexibility in defining "lease" would seem to be one which would be present by implication in any event (i.e., that the administrative treatment of the term "lease"—as in any other phase of administering the stripper well exemption—must not be such as to permit abuse of the exemption).

On the other hand, DOE does not regard its ability retroactively to provide for a more flexible interpretation of the term property to be unqualified. Principles of equity generally favor that those who are similarly situated receive comparable treatment. In this regard, it would be particularly inappropriate for those producers which closely adhered to the regulatory definition of the term "property" to be treated much less favorably than those producers which interpreted the term in a less formal manner. Moreover, DOE is also concerned that unwarranted departures from its regulations not be permitted and that the interests of consumers in full and fair enforcement of the price controls on crude oil be adequately protected.

Accordingly, the detailed discussion setting forth the proper clarification of past applications of the property concept in the following Section II.F. represents DOE's attempt to strike an appropriate balance between the foregoing considerations as to a literal interpretation of the term property vis-a-vis a more flexible interpretation which takes into account factors extrinsic to the language of the definition itself.

DOE believes that the clarifications first announced on August 20, 1976 and set forth in this Ruling are consistent with the practices that have been followed by the substantial majority of producers. However, to the extent that these clarifications would permit any producer to calculate larger volumes of "new," "released," or "stripper well lease" crude oil than were calculated and certified in prior months, no recertifications of additional volumes will be permitted. Such recertifications will be considered, if at all, only on a case-by-case basis on normal grounds of inequity or hardship through the DOE exceptions

process. DOE is aware that in so affording significance to differing good faith definitions of property that have been adopted by producers, similarly situated persons will in some instances be treated differently under the regulations. This fact is, however, counterbalanced in DOE's view by the need for the greatest possible measure of administrative finality to be afforded the determinations already made as to volumes of old crude oil. Appropriate compliance actions will, of course, be taken with respect to applications of the term property which are not consistent with the clarifications set forth herein, to the extent that they have resulted in the certification of greater volumes of new or upper tier crude oil than is permitted. DOE reserves the right in such compliance actions to determine whether any misapplication of the "property" concept, which resulted in improper classification of lower tier crude oil as upper tier crude oil to a particular purchaser, also resulted in that purchaser receiving at lower tier prices other volumes of crude oil that could properly have been certified as upper tier crude oil. In such cases, and in the context of formal compliance action (i.e., by remedial order or consent order), DOE may permit the producer to recertify such amounts of crude oil mistakenly invoiced as lower tier crude oil, but only to the extent that additional funds due the producer because of such recertification do not exceed refunds due to the purchaser because of sales of crude oil by the producer at prices in excess of the appropriate ceiling prices.

F. Past Applications of the Term "Property." The issues with respect to past applications of the term property may, for purposes of convenience, be generally divided into three categories:

- (1) Those involving the delineation of the premises which are subject to a single "right to produce" pursuant to a lease or fee interest,
- (2) Those involving the aggregation of two or more such premises, and
- (3) Those involving the segregation of such premises subject to a single "right to produce."

(1) *The right to produce.* DOE Ruling 1975-15 made it clear that the

property concept is one that begins with "the right to produce crude oil." Consistent with the discussion above of the common meaning of that term as being generally synonymous with the concept of "working interest," the analysis of property will generally begin with identifying the one or more "premises" or "tracts" described in the instrument that confers the right to produce. Generally speaking, except in those cases where the right to produce is conveyed separately with respect to separate horizontal strata, the "premises" as to which the right to produce exists will generally be described in terms of surface acreage—commonly referred to as a "tract." In those instances in which production is undertaken by the owner of the mineral interest in fee, rather than by a lessee, the instrument conveying the fee interest will similarly describe the premises typically in terms of surface acreage, also referred to as a "tract." The terms "premises" and "tract" are both used here to refer to the physical limits as to which a right to produce exists. Since "tract" implies surface acreage, whereas "premises" is not so limited (but also signifies use of three dimensional boundaries), the latter term is preferred.

Difficult issues can arise with respect to construing a lease or deed to delineate the one or more premises as to which a "right to produce" exists under that instrument. This can occur, for example, where a lease conveys a right to produce with respect to described premises, but imposes differing or special rights or obligations with respect to the development of and production from particular portions of the described premises. Generally speaking, where the rights or duties created under a single instrument are significantly different with respect to particular identified portions of a described premises, where a producer has in good faith relied upon such differences in its exploration and development activities, and where the producer has consistently and historically accounted for such portions separately, DOE will permit the lease concerned to be considered as having established more than a single "right to produce" and consequently, more than

a single property. Thus, for example, where the time within which a lessee is obligated to begin production activities varies as to specified portions of a particular tract, those portions of the tract would be subject to differing "rights to produce," and hence, could constitute separate "properties."

(2) *Segregation of Premises Subject to a Single Right to Produce.* More complex issues are posed with respect to the extent to which the premises subject to a single right to produce may appropriately be subdivided to form separate "properties." As noted above, there are instances in which a single lease may create several distinct "rights to produce" with respect to specified portions of the premises described therein. And as discussed below, the aggregation (with premises subject to other rights to produce) of less than all of the premises covered by a single right to produce may result in the subdivision of the premises formerly subject to a single right to produce into at least two properties—the portion which has been aggregated and the portion which remains. There are, however, still further instances in which segregation into one or more properties of a premises subject to a single right to produce appears to have been appropriate under the existing regulations.

a. *Non-contiguous tracts.* One such instance is in the case of non-contiguous tracts. Particularly in the case of fee interests, but also in the case of certain large leases (typically old leases), a single instrument may convey a single undifferentiated right to produce with respect to multiple, non-contiguous tracts, which may be located at great distances from one another. In all cases in which it can be shown that such non-contiguous tracts were developed and produced separately, and where they have historically and consistently been accounted for as separate properties, DOE will continue to permit them to be so regarded. The basis for this determination is principally that DOE understands this to have been a consistent and historic practice and one which was followed to conform the treatment of the typical situation of multiple tracts subject to a single instrument to that afforded

in the more typical situation of a single tract subject to a single lease.

b. *Very large tracts.* Another such instance is in the case of very large tracts which are subject to a single right to produce. Although this problem appears to exist mainly with respect to large fee interests, it also obtains with respect to certain large leases, particularly those granted many years ago by Federal and state governments. As noted above, the modern oil and gas lease typically conveys a right to produce which must be exercised within a specified period in order for production rights to be retained by the lessee. The objective of the lessor is to obtain production in a specified area within a specified time. Accordingly, most oil and gas leases confer a right to produce as to an area within which exploration and development by the lessee can reasonably be expected within a reasonable time—five years is typical.

Owners of mineral interests in fee which undertake their own exploration and development activities are not, of course, bound by any lease obligations with respect to the time within which such activities must take place. Accordingly, exploration and development of a large fee interest may take place over an extended period of time, in much the same manner as if several leases had been conveyed with respect to particular areas and time periods. Similarly, with respect to large leases, a comparable form of phased development may have taken place. Indeed, as to certain large government-granted leases, a "selection" process has been employed, whereby only with respect to those portions of the lease that are developed does the lessee retain production rights. In such cases, the right conveyed by the initial "lease" is more in the nature of a right to explore, which ripened into a right to produce those areas that the lessee has developed in a timely fashion.

In order to treat holders of large tracts subject to a single right to produce—whether by a lease or by fee interest—in a manner that is comparable to the treatment of those who hold a right to produce under the more limited typical modern oil and gas lease which covers a lesser area, DOE has

concluded that separate geological formations subject to the same right to produce which have been developed and produced separately, and which have historically and consistently been accounted for separately may continue to be so regarded.

c. *Partial unitization or other aggregation of interests.* It is not uncommon for less than the total premises subject to a right to produce to be unitized or otherwise aggregated with all or portions of premises subject to other rights to produce, to form a single "property," leaving the balance of the premises formerly subject to a single right to produce not aggregated with any other such rights. The portion of the premises which is not aggregated is appropriately recognized as a property separate and apart from the portion of the premises which has been aggregated with other rights to produce.

In some cases, DOE understands that the inclusion of the so-called "Pugh" clause in a lease would operate to create a separate and distinct right to produce with respect to the non-unitized portion of the premises subject to that lease, by stating that production from the unitized portion of a lease will not serve to fulfill the lessee's production obligations with respect to the non-unitized portion. Thus, the two portions of the lease including such a clause would become separate properties by the terms of the lease itself. However, even where such a clause is not included, DOE has concluded that treatment of the non-unitized portion of the premises as a separate property is appropriate.

d. *Severance tax or royalty owner accountability.* Another instance in which segregation of a premises subject to a single right to produce is appropriate is where the production from identifiable portions of the premises is required to be measured and accounted for separately for purposes of determining severance tax liability or for purposes of accounting to royalty owners. DOE has concluded that where the payment of revenues to State tax authorities or to royalty owners requires separate accounting for production from identified portions of a premises subject to a single

right to produce, and where such portions of the premises have consistently and historically been treated as separate properties, such separate treatment may appropriately be continued.

e. Other segregation not permitted.

The most complex and apparently controversial issue with respect to segregation of a premises subject to a single right to produce has to do with production from separate "reservoirs." DOE has studied this issue at considerable length but has been unable to find a solution which is likely to be satisfactory to all parties concerned. DOE has concluded on the basis of the review of the legislative and regulatory history and the general considerations outlined above that a premises which contains multiple reservoirs but which is subject to a single right to produce may not, simply by virtue of the existence of separate reservoirs, be treated as comprising multiple "properties."

DOE does not believe that the language of the definition of the existing term "property" can be construed to mean that production from separate reservoirs subject to the same working interest would simply by virtue of the fact that the several reservoirs have been developed and produced separately, be regarded as production from separate properties. (Producers have been on express notice of this at least since the issuance of DOE Ruling 1975-15 on August 29, 1975.) Moreover, any producer which adopted a reservoir-by-reservoir approach to the definition of property (and, hence, to the computation of amounts of "new" and "released" crude oil) would typically have been in a position to achieve greater benefits under the price regulations over the past three years than those producers who took the approach of aggregating production from all reservoirs subject to the same right to produce, as required under the regulations. At least until February 1, 1976, any producer that treated each reservoir as a separate property automatically would have obtained "new" crude oil whenever production was obtained from a new reservoir. Producers using the lease approach on the other hand, were required first to exceed 1972 levels of production from

the lease concerned before any production from a new reservoir would be regarded as "new" crude oil. DOE has unfortunately not been able to obtain any approximation of the extent to which producers have actually adopted a reservoir-by-reservoir definition of property.

Under these circumstances, DOE has concluded that it would be inequitable to permit producers who took an expansive—and, in DOE's view, unwarranted—view of the meaning of the term property to obtain benefits that were not afforded to producers who adhered closely to the regulations. Thus, DOE has concluded that separate reservoirs which are subject to the same right to produce will generally not be treated as separate properties prior to September 1, 1976.

There are, however, instances in which for a variety of reasons, it would have been impracticable or inequitable for producers not to have treated separately production from a separate reservoir or reservoirs. Those instances of which DOE is aware have been noted above. There may well be other instances of which DOE is not aware, but which may be appropriately addressed in subsequent rulings as they become known. The mere existence of separate reservoirs and the requirement to report separately the production from such reservoirs in itself will however, only suffice to permit separate property treatment if the producer has applied for exceptions relief and has been permitted to use such a definition in order to avoid serious hardship or gross inequity.

(3) *Aggregation of "Rights to Produce."* The aggregation of separate "rights to produce" pursuant to a unitization agreement was discussed in DOE Ruling 1975-15. There are, however, other circumstances under which separate rights to produce may appropriately be aggregated, pursuant to either voluntary or involuntary arrangements.

Thus, for example, various parties may hold partial undivided interests in the right to produce crude oil from a particular tract. Whether voluntarily through a joint operating agreement or other type of agreement, or pursuant to compulsory state regulations,

such undivided interests in the right to produce from a tract must typically be aggregated before production can begin. Under such circumstances, no apparent purpose would be served by requiring property delineations to be carried back to the individual partial undivided interests which have been aggregated in order to perfect the right to produce.

Another instances in which rights to produce may be aggregated occurs where the premises subject to such rights are required to be combined by a state regulatory agency as a condition to the operation of production activities. Thus, for example, in Louisiana the state regulatory agency will compel a "unit" to be formed by the owners of the tracts with respect to the surface area which overlies the portion of a reservoir that may be efficiently drained by a single well, provided the owners of at least 75 percent of the surface area agree to the formation of a unit.

Similarly, in states that maintain spacing requirements for oil wells, individual rights to produce may need to be combined, whether voluntarily or involuntarily, before a single well may be drilled and the right to produce made effective. Such aggregations of rights to produce (sometimes known as "drilling unit") are also appropriately recognized as single "properties."

Generally speaking, DOE will follow a liberal policy with respect to the aggregation of rights to produce which will be permitted to be treated as a single "property" as long as a bona fide reason for the aggregation can be demonstrated by the producer.

III. THE DEFINITION OF "POSTED PRICE"

DOE price regulations employ historical crude oil posted prices as references for determining lower and upper tier ceiling prices, with lower tier ceiling prices determined by reference to the highest posted price for the same grade of crude oil in the same or nearest field on May 15, 1973, plus a per-barrel increment, and with upper tier ceiling prices determined by reference to the highest posted price for the same grade of crude oil in the same or

nearest field on September 30, 1975, less a per-barrel increment.

The definition of "posted price" was adopted by the Cost of Living Council on November 30, 1973, and has remained substantially unchanged since that time:

"Posted price" means a written statement of crude petroleum prices circulated publicly among sellers and buyers of crude petroleum in a particular field in accordance with historic practices, and generally known by sellers and buyers within the field. (38 FR 18577 at 33578, December 6, 1973.)

Although DOE has until this time issued no interpretive ruling with respect to this definition, the posted price concept has served as the basis for determining lower tier ceiling prices for nearly three years.

On February 1, 1976, in connection with the first stage of rulemaking proceedings to implement the crude oil pricing policy of the EPCA, the DOE rejected its proposal (41 FR 1564, January 8, 1976) to determine upper tier ceiling prices by reference to actual transaction prices, and decided instead to determine upper tier ceiling prices with reference to highest posted prices on September 30, 1975. Most of the comments submitted in the first stage proceeding indicated that postings were prevalent in September 1975, and suggested that the use of fieldwide September postings would avoid other difficulties inherent in DOE's proposal to base upper tier ceiling prices upon actual transactions (e.g., the need to establish a price where there had been no production and sale of crude oil from the property concerned in September 1975).

After publication of the February 1, amendments, however, a substantial number of inquiries were received by DOE relative to the correct application of the posted price concept to the determination of upper tier ceiling prices. (To a much lesser extent, inquiries were also received relative to the posted price for purposes of determining lower tier ceiling prices. However, the problem was said to be not as prevalent with respect to lower tier ceiling prices due to the relative uniformity of crude oil prices in May 1973). Accordingly, DOE solicited com-

ments in the April 13 Notice in order to determine whether any clarifications were necessary with respect to the definition of posted price. Notwithstanding the clearly expressed purpose of soliciting comments in this regard, however, a large number of written as well as oral comments suggested that DOE either

(1) Depart from the posted price concept in favor of the actual transaction approach that was specifically rejected on February 1, or

(2) Interpret the definition of "highest posted price" as the "highest prevailing price," so as to include within the definition actual transaction prices that prevailed on September 30, 1975. On August 20, 1976 after consideration of all the written and oral comments, DOE determined that amendments to the current definition of "posted price" were unnecessary. The following clarifications should resolve any confusion that persists with respect to the posted price concept.

Prior to the implementation of price controls by CLC, the traditional and historical operation of the crude oil market included the use of posted field prices, a mechanism well known among buyers and sellers of crude oil throughout the world as:

The announced price at which a crude oil purchaser will buy the oil (of specified quality) from a field. At one time, the price was actually announced by a statement posted in the field. (More recently, the announcement is usually made in the newspapers. (*Williams and Meyers, Manual of Oil and Gas Terms* at 339.)

The general practice among principal purchasers has been periodically to issue price bulletins, which are widely circulated to the public, announcing the price that that particular purchaser would pay for a particular grade crude oil in a particular location.

It was in this context that CLC adopted the two tier pricing system in August 1978. In the Notice of Proposed Rulemaking issued on July 19, 1973, CLC indicated that the ceiling price for crude oil was to be "the price posted on May 15, 1973 for each grade of petroleum from each particular field." (38 FR 19464 at 19467, July 20, 1973.) The posted price concept was selected because the ready availability

of price bulletins (which were understood to be in normal circulation in May 1973) provided a mechanism whereby producers and purchasers alike could be able to determine the ceiling price for any grade crude oil in any particular field. Moreover, the use of price bulletins avoided the enormous administrative complexity of having to establish ceiling prices that would maintain traditional gravity and quality price differentials.

Although the August 17, 1973 Subpart L Petroleum Price Regulations did not contain a definition of posted price, a definition was adopted by CLC on November 30, 1973 to make it clear "that a posted price must be a publicly circulated written offer to purchase." (Emphasis added, 38 FR 33577 at 33578, December 6, 1973.)

While the CLC definition did not require the formality of a printed price bulletin such as is published by major purchasers, the CLC did require the formality of a "publicly circulated written offer." The requirement that the offer be in writing eliminates verbal offers, and the requirement that the written offer be publicly circulated eliminates offers (even though written) to specified producers. Accordingly, other than the published price bulletins of the type traditionally issued by major oil companies, DOE will only recognize as a "posted price" written offers to purchase only so long as they were bona fide public offers of general applicability to crude oil producers in the field. For example, a letter from a purchaser to all crude oil producers in a field or in an area would constitute a posted price if the letter was understood by producers and the purchaser to be a bona fide offer to purchase from all producers in that field or area. A written contract, of course, would not qualify as a posted price because it represents an agreement between a buyer and specific producer, not a bona fide offer to purchase from all producers.

Accordingly, in determining the "highest posted price," a producer should first determine which offers qualify as posted prices under the definition as interpreted above. The next inquiry is into which of those posted prices were on September 30, 1975 (or

May 15, 1973 for lower tier ceiling prices) applicable to the particular field in question. Once that determination has been made the producer simply identifies the highest price offered among qualified postings.

With respect to determining the applicability of specific postings to particular fields, it has become clear that the principal issue relates to the use of the term "field" in the definition of posted price. Buyers and sellers alike indicated that inasmuch as "field" is not a defined term, conflicting September 30, 1975 "highest posted prices" occur in many areas of the country. Specifically, the term "field" has different accepted meanings and usages in various producing areas, and consequently might have been interpreted to mean an area as small as a lease, or as large as one or more entire state. However, for purposes of posting crude oil prices, crude oil producers and purchasers have generally understood the term "field" to signify a general area underlain by one or more reservoirs. For example, while some price bulletins refer specifically to named fields in which the particular price prevails, other types of bulletins specify a price for a particular grade of crude oil, which is produced over a large geographical area—perhaps even over an area of one or more states.

The problem arises where a single price bulletin was issued for an area and grade of crude oil (without specifying particular fields), while a price bulletin was issued by a competing buyer offering a higher price, but specifically limited to certain named fields which do not include all the fields within the larger area referred to in the price bulletin offering a lower price. Resolution of such disputes should be as follows: Price bulletins which specify only a geographical area and crude oil grade (e.g., "West Texas Sour") are presumed to be applicable to every field within the named area, unless a particular field is specifically excluded. However, the existence of a price bulleting stating a higher price for specifically named fields within the same area will, of course, supersede the area-wide price bulletin, for the named field only.

Finally, there should remain no question that posted prices used to establish lower tier ceiling prices, as well as posted prices for upper tier crude oil, do "not include premiums above posted prices which may have been paid for crude purchased on May 15, 1973 [or September 30, 1975] (38 FR 33577 at 33578, December 6, 1973)." This was made clear by CLC in November 1973 and should have been understood since that time.

IV. APPLICABILITY OF THE STRIPPER WELL PROPERTY RULE TO CONDENSATE PRODUCED FROM GAS WELLS

Prior to February 1, 1976, 10 CFR 210.32 provided an exemption from price and allocation regulations for the first sale of "crude oil, including condensates, produced from any stripper well lease." * * * A stripper well lease was defined in § 210.32 as a

"property" whose average daily production of crude oil, including condensates, per well did not exceed 10 barrels per day during any preceding calendar year beginning after December 31, 1972.

In DOE Ruling 1974-28 (39 FR 44414, December 24, 1974), DOE held that the stripper well lease exemption was inapplicable to condensate produced from gas wells. This issue was subsequently reconsidered in the context of a formal rulemaking proceedings, and on August 29, 1975, DOE determined that, in all respects except the applicability of the stripper well lease exemption to gas wells, Ruling 1974-28 remains interpretive of the price regulations, since they were first promulgated (40 FR 40818, September 4, 1975). With respect to the treatment of gas-well condensate for purposes of the stripper well lease exemption, DOE concluded that because of the good faith treatment by producers of gas-well condensate as being eligible for treatment under the stripper well lease exemption prior to the issuance of Ruling 1974-28, DOE would not require gas-well condensate to be excluded from the scope of the stripper well lease exemption until January 1, 1976, so that the impact of Ruling 1974-28 in this respect was made prospective only.

On February 1, 1976, the stripper well lease exemption was deleted from DOE price and allocation regulations pursuant to the removal of the former exemption of the EPAA by section 401(b)(1) of the EPCA. However, DOE determined that in keeping with the congressional objectives embodied in the EPCA, crude oil produced from stripper well leases should qualify for treatment as upper tier crude oil. At that time the definition of a stripper well lease was modified to make it clear that only "crude oil (excluding condensate recovered in nonassociated production)" is counted in determining whether the property qualifies as a stripper well lease.

Since the issuance of DOE Ruling 1974-28, certain producers have indicated that some uncertainty exists as to the meaning of the term "gas-well condensate," inasmuch as different state classifications might result in wells having basically the same productive characteristics being classified as a gas well in one state and an oil well in another.

In the August 29, 1975 Notice, DOE recognized this issue and stated:

In order further to eliminate any uncertainty that might have arisen from the [original] regulatory language, conforming amendments are made today, effective January 1, 1975, to the stripper well lease exemption in 10 CFR 210.32 to reflect that the exemption extends only to crude oil and condensate recovered in associated production. (Emphasis added, 40 FR 40820.)

Thus, the qualification of a property as a stripper well property is only prohibited to the extent that the property consists of wells having only non-associated production of natural gas and condensates. That is, unless a well produces some crude oil, the well fails to qualify for inclusion as a producing well in the stripper well property computations.

Therefore, if a well produces from an associated reservoir (i.e., a reservoir in which gas occurs in association with crude oil), that well may be included to determine if the property is a stripper well property only if crude oil is produced from that well. If only condensate is produced, in association with the gas the well may not be included to determine if the property is

a stripper well property. On the other hand, if a well is producing non-associated gas (i.e., free gas not in contact with crude oil in the reservoir), or only natural gas (even if from an associated gas reservoir), that well may not be included as a producing well because it does not produce crude oil.

To the extent that a single property includes wells of both types, only the wells that produce crude oil may be counted in calculating average daily production. The volumes of condensate produced from the non-associated gas wells are not properly included in the calculation of the property's average daily production.

In the April 13 Notice DOE solicited comments on the extent to which the distinctions outlined above may be made with uniformity in various states. Notwithstanding this specific request, the thrust of most comments was to urge DOE to eliminate the distinction between condensate produced in associated and non-associated production, and to extend the stripper well property provisions to all condensate production. In the August 20 Notice DOE rejected these suggestions and noted that such a proposal was then being considered in the context of the third stage rulemaking to implement the EPCA to adopt a stripper well property rule applicable to condensate recovered in non-associated production. (See 41 FR 18873 at 18876, May 7, 1976.)

With respect to the current stripper well property rule however, the DOE has determined that the distinctions set forth in the April 13 Notice and reproduced here are valid and will continue to serve to determine which producing wells are to be counted for purposes in determining if the property is a stripper well lease.

[42 FR 3628, Jan. 19, 1977]

RULING 1977-3—DOMESTIC CRUDE OIL, FURTHER CLASSIFICATIONS TO MANDATORY PETROLEUM PRICE REGULATIONS

I. BACKGROUND

On August 20, 1976, the Department of Energy ("DOE") issued a Notice entitled "Clarifications to Mandatory Petroleum Price Regulations Applicable

to Domestic Crude Oil" (41 FR 36172, August 28, 1976). In the August 20 Notice DOE adopted certain regulatory amendments designed to improve the incentives offered under the two tier pricing system. DOE also set forth its conclusions with respect to a variety of technical issues that had arisen in connection with DOE's implementation of the crude oil pricing policy of the Energy Policy and Conservation Act ("EPCA," Pub. L. 94-163). The conclusions with respect to these issues were subsequently contained in "DOE Ruling 1977-1" (42 FR 3628, January 19, 1977). Among the specific issues addressed in the August 20 Notice were the definitions of "property" and "posted price"; whether a well is properly classified as an oil well for purposes of the stripper well property rule; and the partial rescission and modification of "DOE Ruling 1975-15" (including the issue whether a property's producing patterns have been "significantly altered" for purposes of treating a unitized property as a single property under the price regulations).

Although the August 20 Notice addressed many of the issues raised in connection with the price regulations applicable to first sales of domestic crude oil, it was recognized and expressly noted in the August 20 Notice itself, that there might remain some issues that justify further consideration. Accordingly, further comments were requested addressed to the way in which the issues considered in the August 20 Notice were resolved, or to any other issue not specifically considered in that Notice that might need clarification and resolution.

DOE has received written comments specifically in response to the request in the August 20 Notice—and several other comments of a less formal nature—which indicate the need for additional technical clarification of some of the issues addressed in the August 20 Notice. These comments also illustrate the need to clarify a number of issues not otherwise previously resolved. Accordingly, the purpose of this Ruling is to resolve as many as possible of the remaining issues that have arisen with respect to the price regulations applicable to first sales of domestic crude oil. Some

of these issues relate to past applications of the definition of property, while others of these issues relate to the reservoir definition of property adopted by DOE effective September 1, 1976. Conclusions stated in this Ruling with respect to past applications of the definition of property will be applied from August 1973 forward. Clarifications stated in this Ruling with respect to the reservoir definition of property which was adopted effective September 1, 1976 will be applied from September 1, 1976 forward.

II. PAST APPLICATIONS OF THE DEFINITION OF "PROPERTY"

As indicated above, comments have been received from interested parties raising several issues with respect to certain conclusions contained in the August 20 Notice (and later restated in "DOE Ruling 1977-1"), which justify further clarification at this time.

A. CONTINUATION AFTER SEPTEMBER 1, 1976, OF PAST APPLICATIONS OF THE DEFINITION OF "PROPERTY"

In "Ruling 1977-1," DOE set forth its conclusions with respect to certain past applications of the definition of property in which departures from a literal application of the "premises described by an oil and gas lease" concept were permissible. As proper departures from a literal interpretation, DOE discussed generally (1) situations in which a single oil and gas instrument might convey more than one right to produce, which might properly have been treated as more than one "property"; (2) situations in which premises subject to a single right to produce could properly have been segregated into two or more properties for purposes of the price regulations; and (3) situations in which two or more single rights to produce (or parts of two or more single rights to produce) could properly have been aggregated into a single property for purposes of the price regulations. Specific examples of each of these situations were given in "Ruling 1977-1".

Several producers have requested DOE to clarify whether determinations of property status, made in accordance with the clarifications set

forth in "Ruling 1977-1," may continue to be used after September 1, 1976.

DOE will permit producers to continue such determinations after September 1, 1976, insofar as they were made in accordance with the clarifications contained in "Ruling 1977-1." Those clarifications are applicable to the definition of property as it was adopted by the Cost of Living Council ("CLC") in August 1973, and which remained substantially unchanged until its amendment by DOE effective September 1, 1976. Moreover, the September 1 amendment did not alter the basic property definition, which continues to provide in part:

"Property" means the right to produce domestic crude oil, which arises from a lease or from a fee interest * * *.

The substantive effect of the September 1 amendment was to provide an option, whereby producers:

May treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation.

Accordingly, the September 1 amendment merely provided an option whereby producers might, in certain circumstances on or after September 1, 1976, make property determinations from that time forward on a reservoir-by-reservoir basis. Inasmuch as DOE made no substantive change in the basic property definition as it had existed since promulgation by CLC in August 1973, the clarifications contained in "Ruling 1977-1" continue to be valid with respect to construing "the right to produce crude oil." Therefore, DOE will, after September 1, 1976, continue to recognize property determinations which comport with those clarifications.

Where a producer's historical and consistent property determinations comport with the clarifications contained in "Ruling 1977-1", such determinations, of course, are required to be continued by the producer after September 1, 1976, and may be altered only to the extent that for each such property, the producer may, but is not

required to, treat each separate and distinct producing reservoir as a separate property after September 1, 1976, if such reservoir meets the separate reservoir criteria as set forth in the September 1 amendment and further clarified in Part III of this Ruling.

Inasmuch as the clarifications to past applications of property have been recognized by DOE as appropriate departures from a literal application of the "premises described by an oil and gas lease" concept only to the extent that such determinations were employed by a producer historically and consistently since the inception of price regulations when such determinations were first required to be made, such departures are generally not permitted to be adopted for the first time subsequent to DOE's issuance of the August 20 Notice, where the clarifications were first announced. However, DOE recognizes that some producers departed from historical and consistent "property" determinations that would have comported with the clarifications set forth in the August 20 Notice in order to make property determinations based upon a more literal application of the "premises described by an oil and gas lease" concept. Where this was done at the outset under CLC regulations, or where it was done later in response to a CLC, FEO or DOE compliance action, DOE will permit such determinations to be readopted effective September 1, 1976.

B. SEGREGATION OF PREMISES SUBJECT TO A SINGLE RIGHT TO PRODUCE, ACCORDING TO SEVERANCE TAX OR ROYALTY OWNER ACCOUNTABILITY

1. Royalty owner accountability. DOE indicated in "Ruling 1977-1" that:

Where the payment of revenues to state tax authorities or to royalty owners requires separate accounting for production from identified portions of a premises subject to a single right to produce, and where such portions of the premises have consistently and historically been treated as separate properties, such separate treatment may appropriately be continued.

DOE has received a number of inquiries regarding this clarification, specifically with regard to division orders. Al-

though there was no specific discussion of this issue in "Ruling 1977-1," DOE understands division orders generally to be a means whereby the purchasers of crude oil from a property are authorized to distribute the payment for purchases of crude oil produced and sold from the property among the various interest holders who are entitled to such distribution.

Inasmuch as DOE understands the typical division order to act primarily as a means to protect the purchaser against the possibility that payment for crude oil produced and sold from a certain property might be improperly distributed—rather than as an instrument which acts to segregate a premises subject to a single right to produce—the language above was not intended to suggest that the treatment by a producer of each division order as establishing a separate property was appropriate under the price regulations. Moreover, the language above referred only to royalty owners (and not to overriding royalty owners, working interest owners, or other interest owners) and therefore takes into account only the situation in which an operator is required, under a single oil and gas lease to account separately to different royalty owners (whose interests are limited to specific identified portions of the premises, as delineated in the oil and gas lease) for production from corresponding identified portions of the premises granted in a single oil and gas lease.

To illustrate, such an instance might exist where "O," the owner of an oil and gas interest in Blackacre granted a working interest in Blackacre to a producer "P," reserving a royalty interest in production from the North half of Blackacre to "O's" daughter, and reserving a royalty interest in production from the South half of Blackacre to "O's" son, and where P has historically and consistently treated the North and South halves of Blackacre as separate properties. In this instance, therefore, when originally making property determinations, P might appropriately have determined that for purposes of the price regulations, the North half of Blackacre constituted one property, and the South half of Blackacre constituted a sepa-

rate property, because of the requirement to account for production from the North half of Blackacre to one royalty owner and the requirement to account for production from the South half of Blackacre separately to a different royalty owner. On the other hand for example, where several small tracts (each having different royalty interests) have been aggregated under a single lease granting a single operating interest in order to meet minimum well spacing requirements, the single premises granted in the lease should have been treated as a single property regardless that payment was made to different royalty owners and accounted for separately on the basis of their proportionate interests in that premises. The mere existence of separate royalty owners and a requirement to account to them separately for their proportionate interests does not satisfy the requirement that there be " * * * separate accounting for production from identified portions of a premises * * * ." In other words, with respect to royalty owner accountability, it is only where production and sale of crude oil from an identified portion of a premises subject to a single right to produce entails no duty to account to royalty owners of another identified portion of the premises that separate properties may exist.

2. *Severance tax accountability.* With respect to separate accounting for severance tax purposes, DOE understands that it might be necessary in some instances for a producer to account separately for different types of crude oil produced and sold from different specified portions of a tract in order to determine liability for severance taxes to the state in which the property is located.

It is DOE's understanding that although this is not usually the case, it may be necessary in isolated cases where the severance tax is more in the nature of an ad valorem real estate tax, the rate of which varies according to the value of the crude oil produced and sold from the property. In such a situation, where the imposition of an ad valorem tax has required the producer separately to account for production from separately identified por-

tions of a premises subject to the same right to produce crude oil, and where the producer has since the inception of price regulations consistently treated such distinct portions of the premises as separate properties, such separate property treatment may appropriately be continued. On the other hand, where a severance tax is determined merely by applying a fixed tax rate to total production volume (normally on a firm-wide basis), separate property treatment would not have been appropriate unless "different rates of tax were applied to identified portions of a particular premises."

With respect to severance tax accountability, then, the mere fact that total tax liability may be determined by cumulating production figures that are required to be reported on a well-by-well basis does not mean that there is severance tax accountability on a well-by-well basis. Such separate accountability exists only where separate accounting for production from identified portions of a premises is required in order to determine a severance tax liability which is different from that which would have resulted had there not been such separate accounting.

C. SEPARATE GEOLOGICAL STRUCTURES

DOE made it clear in "Ruling 1977-1" that prior to September 1, 1976:

A premises which contains multiple reservoirs but which is subject to a single right to produce may not, simply by virtue of the existence of separate reservoirs, be treated as comprising multiple "properties."

Notwithstanding this clear prohibition against separate reservoir treatment before September 1, 1976, DOE has received further comments since August 20, 1976 which indicate that some parties have perceived a conflict between this policy and the discussion in "Ruling 1977-1" involving segregation of a premises subject to a single right to produce in the case of "very large tracts," where DOE indicated that:

Separate geological formations subject to the same right to produce which have been developed and produced separately, and which have historically and consistently been accounted for separately may continue to be so regarded.

By this language DOE did not intend to imply that separate reservoir treatment was proper in every case before September 1, 1976. Rather, this discussion recognizes that in certain instances extremely large tracts—sometimes large fee interests, but more commonly large state-owned leases—were developed and produced pursuant to a single lease or fee interest under circumstances that made treatment of separate geological formations as separate properties appropriate.

The term "geological formation" was used in this regard to signify not an individual producing reservoir, but a number of producing reservoirs, usually of common characteristics. This term should be understood in this context to be equivalent to the term "geological structure," which has been defined as:

Layers of sedimentary rock which have been displaced from the horizontal by various forces of nature. Five general categories of structures are recognized: (1) Faults, (2) anticlines, (3) monoclines, (4) synclines, and (5) domes. ("Williams and Myers, Manual of Oil and Gas Terms" at 199.)

DOE will not permit, before September 1, 1976, the treatment of separate reservoirs as separate properties except in those cases where such treatment was permitted by express DOE order or interpretation, as indicated in "Ruling 1977-1." In order further to eliminate any confusion that might exist with respect to geological formations, a technical amendment to the definition of property will be made effective September 1, 1976, to eliminate any reference in that definition to producing "formation."

III. SEPTEMBER 1, 1976, AMENDMENT TO THE DEFINITION OF "PROPERTY"

As DOE indicated in the August 20 Notice, DOE's initial consideration of a reservoir property definition led to the conclusion that the advantages of permitting producers to make property determinations on a reservoir-by-reservoir basis were largely outweighed by the attendant administrative complexity associated with DOE having to (a) make reservoir determination in the first instance, and/or (b) verify asserted determinations previ-

ously made by others. DOE's further consideration of this issue resulted in adoption of a system that would permit DOE to "defer to other expert agencies to make reservoir-by-reservoir determinations" (41 FR 36179). Therefore, the September 1, 1976 definition of property permits producers to treat as separate properties, each separate and distinct producing reservoir underlying a tract, to the extent that the reservoir is recognized by the appropriate governmental regulatory authority, and production has been consistently and historically reported as such.

A. RESERVOIR RECOGNITION BY THE APPROPRIATE GOVERNMENTAL REGULATORY AUTHORITY

In requiring governmental recognition of a reservoir before a producer may treat that reservoir as a separate property under the September 1, 1976 amendment, DOE sought to adopt a system whereby DOE auditors could have at their disposal easily understandable records from which could be determined the limits of each producing property. Moreover, the requirement that production must have been reported to the governmental authority on the basis of its reservoir determination, is intended to ensure a necessary supplemental means for DOE to verify production and sales volumes used to determine volumes of upper and lower tier crude oil. By itself, however, the mere requirement by a state or other regulatory authority for producers to report on a reservoir-by-reservoir basis does not constitute "recognition" by the governmental authority.

DOE understands that most states in which crude oil is produced in significant volumes have historically regulated the production of crude oil for various reasons, principally to ensure the conservation of the state's natural resources. In this regard, most producing States have empowered regulatory bodies to govern the drilling of wells and the production of oil and gas. In many instances, the State regulatory body limits well density and will not permit the drilling of additional producing wells into a reservoir that has already been developed. Inasmuch as

development drilling and production are typically regulated on a reservoir-by-reservoir basis, most State regulatory bodies make some determination with respect to whether production from a new well will affect production from a developed reservoir. Where controlled, rates of production are typically set by the State, and these rates are determined on a reservoir-by-reservoir basis, and production volumes are reported to the State by the producer on a basis that production from each reservoir on each lease can be determined.

What constitutes "recognition" by the appropriate governmental authority will be a matter for resolution on a case-by-case basis by DOE regional officials who are in a position to be more familiar with State practices in their region. Generally, however, the following guidelines shall be used in making such determinations. The mere requirement that a producer must report to the regulatory body on the basis of separate reservoirs does not constitute government recognition. Rather, before a producer may treat a producing reservoir as an DOE property, there must have been some review by the appropriate regulatory body of factual considerations leading to a determination by the regulatory body that the reservoir is separate and distinct from, and not in communication with, any other reservoir subject to the same right to produce. Such determination by the regulatory body must be signified by an affirmative action: the mere receipt by the regulatory body of production or other types of reports, for example, does not constitute the requisite affirmative action.

In some States, the State regulatory body may conduct a formal proceeding to establish the limits of producing reservoirs. At such proceedings, evidence is taken from interested parties, a hearing is held, and after thorough consideration of the record, the State issues an order setting forth its determination as to the physical limits of the reservoir. The State's determination contained in such an order would constitute the requisite affirmative action.

DOE recognizes, however, that not all States have such thorough proce-

dures for making reservoir determinations. Nevertheless, in most States some review of factual considerations is made by the regulatory body, and some affirmative determination (usually contained in an order) as to the limits of the reservoir are made. Where such review is undertaken, DOE will recognize a subsequent affirmative determination by the State as "State recognition" of the existence of a separate reservoir. Provided also that the producer is required to report production volumes to the State on the basis of that determination, the producer may, effective September 1, 1976, treat the reservoir as a separate property.

With regard to properties not subject to the jurisdiction of any State regulatory body, a similar determination by an other governmental authority (e.g., the United States Geological Survey) will be recognized by DOE as "governmental recognition" so long as the determination satisfies the guidelines set forth above.

B. THE REQUIREMENT THAT EACH RESERVOIR BE SEPARATE AND DISTINCT AND NOT IN COMMUNICATION WITH ANY OTHER RESERVOIR SUBJECT TO THE SAME RIGHT TO PRODUCE

The principal objective in permitting producers to treat separate reservoirs as separate properties is to maximize the incentive to increase production by allowing:

Decisions regarding the exploration for and development of crude oil reserves (to be) made on an individual reservoir basis without regard to the happenstance of production characteristics of other reservoirs underlying the same tract. (41 FR at 36178.)

That is, DOE believes that over the remaining term of crude oil price controls mandated by the EPCA the incentives intended under the two tier price system will work best to the extent that producers are able to make economic determinations and production decisions on the basis of separate producing entities. Inasmuch as DOE also believes that in the absence of crude oil price controls such decisions would be made on a reservoir-by-reservoir basis, the rewards offered under the two tier system of

price controls should be structured accordingly.

Therefore, for example, DOE believes that where a producer is faced with the expenditure of large sums of capital to initiate measures designed to increase production from one producing reservoir—or to develop a new reserves subject to the same right to produce—the producer should be permitted to measure the benefits of such a decision against the real risks, and should not be required to take into account the production characteristics of other producing entities, "the production from which is not physically affected by actions taken with respect to the producing entity under consideration."

The same rationale, however, does not apply where production from two or more reservoirs (that are otherwise separate and distinct) is commingled in the well bore, because the production characteristics become interrelated. For this reason, the September 1 amendment permits a producer to treat as separate properties separate and distinct producing reservoirs only to the extent that they continue not to be in communication with each other. Accordingly, a producer may not treat as separate properties two or more otherwise separate and distinct producing reservoirs if production from those reservoirs is commingled in the well bore. To the extent that commingled production is begun from two or more reservoirs subsequent to a post-September 1, 1976 determination by the producer to treat the reservoirs as separate properties, the producer must, as of the date that commingled production is begun, treat the two or more reservoirs as a single property. Where this is required, the BPCL for the single property (consisting of the two or more reservoirs with commingled production) will be determined as the sum of the BPCL's for all the reservoirs from which production is commingled. Moreover, the property (consisting of two or more reservoirs with commingled production) will be determined to have a current cumulative deficiency, if any, equal to the sum of the current cumulative deficiency as of the date production is commingled

for all the reservoirs from which production is commingled.

In this context of determining two or more reservoirs to be separate and distinct, DOE will recognize production not to be "commingled" in a particular well where the well meets the test of a "multiple completion well" as set forth in "DOE Ruling 1975-12" (40 FR 40828, September 4, 1975), i.e., where:

(a) The well consists of two (or more) separate tubing strings run inside the casing, each of which carries crude oil from a separate and distinct producing reservoir, and

(b) The production capabilities of each reservoir are unaffected by any change in the production level of any other reservoir producing through the same well.

Additionally, for purposes of determining if two or more reservoirs are "separate and distinct and not in communication with each other," DOE will recognize production not to be commingled—even though produced through a single well—where production from one reservoir is carried through a tubing string and production from a separate and distinct reservoir is carried through the annulus between that tubing string and the casing: *Provided*, That the production capabilities of each reservoir are unaffected by any change in the production level of any other reservoir being produced through the same well; *And provided further*, That production from each reservoir can be separately measured at the wellhead. Where two otherwise separate and distinct producing reservoirs are produced through a multiple completion well that meets either test set forth above, either or both of the reservoirs may be treated as a stripper well property to the extent that production levels of 10 barrels or less per well per day are sustained from that reservoir for 12 consecutive months following a determination to treat the separate reservoirs as separate properties. (See Part III.E. of this section.) However, the recognition of two reservoirs as separate and distinct (where crude oil is produced through the annulus between a tubing string and the casing), does not affect the test announced in "DOE Ruling 1975-12" for determining when a multiple completion well may be treated

as two or more producing wells for purposes of the stripper well property rule, where the reservoirs are not treated as separate properties. In the case of a multiple completion well that produces from two separate reservoirs not treated as separate properties, the multiple completion well may be treated as two or more producing wells for purposes of the stripper well property rule only if it meets the standards set forth in "DOE Ruling 1975-12."

The requirement that two or more otherwise separate and distinct producing reservoirs be treated as a single property because of commingled production applies on a property-by-property basis. That is, where production from two or more otherwise separate and distinct reservoirs is determined to be commingled with respect to a particular property, a producer from a second property may nevertheless treat those same reservoirs as separate properties, so long as production from those reservoirs is not commingled on the second property.

Finally, DOE will not consider production from two or more otherwise separate and distinct reservoirs to be commingled where the reservoirs are produced through different wells but such production is commingled into a single tank battery, provided that production is separately measured at the wellhead, or that production volumes are allocated back to each well based on regular well tests.

C. TREATMENT OF SEPARATE RESERVOIRS AS SEPARATE PROPERTIES

With respect to the treatment of separate reservoirs as separate properties, DOE has not required that such decisions be made immediately for every property. To the contrary, producers are permitted to make separate reservoir determinations at any time on or after September 1, 1976. Of course, post-September 1, 1976 determinations to treat separate reservoirs as separate properties must become effective from the first day of the month in which such a decision is made and may not be applied retroactively beyond the two-month recertification restriction of 10 CFR 212.72. Under no circumstances are such de-

terminations permitted to affect volumes of crude oil produced and sold prior to the September 1, 1976 effective date of the amendment to the definition of property.

Once a producer has elected to treat separate reservoirs subject to a single right to produce as separate properties, such a decision shall be effective from that time forward with respect to all of the separate and distinct producing reservoirs subject to the same right to produce. To permit the selective segregation of individual reservoirs subject to the same right to produce might encourage selective recalculation of base production control levels ("BPCL") solely to increase levels of new crude oil without promoting any increase in crude oil production.

Moreover, the decision to segregate all of the producing reservoirs subject to the same right to produce, is one that, once made for a particular property, is not subject to modification throughout the duration of price controls applicable to the first sale of domestic crude oil. Purchasers as well as producers must be able to function under a system of price regulation with an adequate degree of finality. To permit the continual redesignation of properties (with the accompanying recomputations of BPCL's) would unnecessarily complicate the operation of the two tier pricing system without providing any discernible additional incentives to producers to increase domestic production. As only one example, such a practice would involve a multitude of additional certifications, and would defeat the purpose of certification requirements intended to be made one time for each property.

The only exception to this policy will be, as indicated above, where commingled production begins subsequent to a post-September 1, 1976 determination to treat separate reservoirs as separate properties, or where two or more reservoirs are subsequently unitized. Where such commingled production is begun for two or more, but less than all, of the reservoirs subject to the same right to produce, only those commingled reservoirs must then be aggregated to form a single property, and all other separate and distinct reser-

voirs must continue to be treated as separate DOE properties.

Accordingly, for each property, effective September 1, 1976, each producer may treat each separate and distinct producing reservoir as a separate property. To the extent that a single property consists of several reservoirs, only some of which are commingled, the producer may treat the non-commingled reservoirs as separate properties (if all such reservoirs are so treated), and if so, production from commingled reservoirs must be aggregated and treated as a separate property (or properties, if there is more than one set of commingled reservoirs). Moreover, to the extent that the property consists of what the producer believes to be more than one separate and distinct reservoir (only some of which are recognized by the appropriate governmental authority) the decision to treat any one governmentally-recognized reservoir as a separate property must include all such governmentally-recognized reservoirs. Any other production from the property, even if believed by the producer to be from separate and distinct reservoirs, must, in the absence of governmental recognition, be aggregated and treated as if from a single property.

The decision to redesignate properties on the basis of separate and distinct producing reservoirs need not be made for all of a producer's properties. For any particular property, however, a producer must treat separate and distinct reservoirs as separate properties according to the requirements set forth above. If the producer elects so to treat any one separate reservoir. Once separate reservoir designations are made for a specific property, any newly-developed producing reservoir must be designated as a separate property.

D. DETERMINATION OF BASE PRODUCTION CONTROL LEVELS ON A RESERVOIR-BY-RESERVOIR BASIS

In the August 20 Notice, DOE set forth guidelines for recalculating BPCL's for properties redesignated on or after September 1, 1976 on a reservoir-by-reservoir basis. Those guidelines did not, however, address the

treatment of current cumulative deficiencies in making such recalculations. The failure of DOE in the August 20 Notice specifically to address the treatment of cumulative deficiencies has generated sufficient comment from interested parties to justify the following, more detailed guidelines, which are to be used by producers that elect to treat separate reservoirs as separate properties in determining BPCL's for those reservoir-properties.

As of the effective date upon which a producer elects to redesignate a particular property on the basis of each separate and distinct reservoir encompassed by that property, the producer must determine a BPCL for each reservoir. This is done generally by making "attributed" calculations for each reservoir as if the reservoir had been a separate property since the inception of the price regulations (i.e., by calculating attributed volumes of new, released and old crude oil for each reservoir for every month from August 1973 to the effective date that the reservoir is treated as a separate property). It should be emphasized that these calculations of attributed volumes are done only for the purpose of determining a BPCL and a cumulative deficiency (if any) for each reservoir-property; no recertification of any volumes of new, released, or stripper well crude oil is intended and none will be permitted.

1. *Reservoirs from which no crude oil was produced in 1972.* As DOE stated in the August 20 Notice, any reservoir from which no crude oil was produced in 1972 will, as of the effective date that the producer elects to treat that reservoir as a separate property, have a BPCL of zero. This result is reached because, had the reservoir been treated as a separate property since the inception of price regulations, that "property" would have produced and sold all new crude oil. Inasmuch as the "property" would have produced and sold no old crude oil in 1975, its BPCL effective February 1, 1976, would also have been zero.

Accordingly, for any reservoir that did not produce crude oil in 1972, the BPCL for that reservoir-property will be zero. Inasmuch as production of crude oil could not at any time have

been less than the reservoir-property's BPCL, there can be no cumulative deficiency for such reservoir-property.

2. *Reservoirs from which crude oil was produced in 1972.* For any reservoir from which crude oil was produced in 1972, the producer must, as of the effective date that the reservoir is treated as a separate property, determine a BPCL. This will be accomplished as follows:

a. The producer must establish an "attributed BPCL." The initial step in determining a reservoir-property's attributed BPCL is to determine the actual production and sale of crude oil from the reservoir for every month in 1972.

b. Based on those figures, the producer must then establish the attributed volumes of new and released crude oil for the reservoir-property, for each month from August 1973 through January 1976. This is accomplished by comparing actual production and sale volumes for the reservoir for every month during that period with the attributed BPCL. For any month (during that period) in which production and sale from that reservoir did not exceed the attributed BPCL, an attributed cumulative deficiency will exist. Any volumes of attributed cumulative deficiencies must be accounted for in subsequent months in determining volumes of attributed new and attributed released crude oil.

c. The producer must then establish an attributed BPCL based upon average monthly production and sale of attributed old crude oil for the reservoir-property in 1975.

d. The producer will then be able to compare the attributed 1972 BPCL with the attributed 1975 BPCL. The lower attributed BPCL may then be adopted as the reservoir-property BPCL for the period commencing with February 1, 1976 and thereafter.

e. Using the reservoir-property BPCL the producer should determine attributed volumes of new and old crude oil for every month during the period from February 1, 1976 to the effective date that the reservoir is treated as a separate property. The reservoir-property begins on February 1, 1976 with no attributed cumulative de-

iciency. However, once attributed new crude oil was "produced and sold" from the reservoir after February 1, 1976, and the actual monthly production and sale of crude oil from the reservoir subsequently fell below the attributed BPCL, an attributed cumulative deficiency must be accounted for. Any attributed cumulative deficiency existing on the effective date that the reservoir is treated as a separate property must then be accounted for before any new crude oil may be sold from that reservoir-property. (The use of 1972 or 1975 as the reservoir-property's BPCL may be done for each reservoir independently, but calculations of attributed volumes of new crude oil must be made as if a BPCL selection had occurred on February 1, 1976. That is, calculations of attributed cumulative deficiencies subsequent to February 1, 1976 may be made based upon either year. However, once those calculations are made, the same base year (either 1972 or 1975) must continue to be used thereafter to determine actual volumes of new and old crude oil.)

E. TREATMENT OF SEPARATE RESERVOIRS AS STRIPPER WELL PROPERTIES

Effective September 1, 1976, prices charged in the first sale of crude oil produced and sold from a stripper well property are exempt from the price regulations applicable to first sales of domestic crude oil. A "stripper well property" is defined in 10 CFR 212.54 as:

a "property" whose average daily production of crude oil (excluding condensate recovered in non-associated production) per well did not exceed 10 barrels per day during any preceding consecutive 12-month period beginning after December 31, 1972.

Section 212.54 was adopted by DOE on October 29, 1976 (41 FR 40319, November 3, 1976) to implement the congressional policy, set forth in the Energy Conservation and Production Act ("ECPA," Pub. L. 94-385), of promoting continued production of crude oil from marginal properties. In this regard, DOE indicated in the October 29 Notice that:

as evidenced in the ECPA legislative history, the Congress has intended to prolong

the production of crude oil from properties that produce 10 barrels per well per day or less, and *not to generate development of new stripper well properties.* (Emphasis added, 41 FR at 48321.)

Accordingly, DOE made it clear that newly-developed properties must establish a 12-month history of marginal production before they may be treated as stripper well properties.

DOE believes that the same policy is appropriately applied to newly-designated properties, whose property status is predicted upon a reclassification, on or after September 1, 1976, by the producer.

The September 1 amendment to the definition of property was designed to ensure that the incentives intended under the two tier price system would be maximized over the remainder of the term of crude oil price controls mandated by EPCA. Accordingly, the option to treat separate reservoirs as separate properties is intended to provide producers with additional incentives, through additional revenues, to increase production, and not to promote property reclassifications solely to achieve stripper well property status.

To the extent that an individual reservoir-property sustains production levels of 10 barrels or less per well per day for a period of 12 consecutive months after being designated a property, that reservoir-property would, of course, qualify as a stripper well property.

IV. UNITIZED PROPERTIES

In order to resolve certain issues that have arisen with respect to the price regulations applicable to unitized properties, it is necessary to review several actions that have been taken by DOE in this regard.

A. RULING 1975-15

On August 31, 1975, DOE issued "Ruling 1975-15" (40 FR 40832, September 4, 1975) addressed to those cases where, due to a change or restructuring since 1972 of the right to produce crude oil, guidance concerning application of the definition of "property" would be required in determin-

ing BPCL's. In particular, "Ruling 1975-15" stated that:

... where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all the several leases that now comprise the unit. (40 FR at 40832.)

In response to comments urging reconsideration of "Ruling 1975-15," DOE, on February 1, 1976 (in connection with the first stage rulemaking to implement the pricing policy of the EPCA) rescinded that part of the Ruling which required producers of unitized properties to total all the BPCL's of the participating leases and to treat the unit as a single property as of the date of unitization. Instead, producers of unitized properties were permitted to continue to determine quantities of upper tier crude oil on a lease-by-lease basis until the actual implementation of enhanced recovery operations or until such time as there has been "a significant alteration in producing patterns," whichever occurred first. The February 1 Notice did not define "a significant alteration in producing patterns" but indicated instead that a Ruling would follow, to set forth objective criteria to be used in determining when a significant alteration of producing patterns has occurred on a unitized property. (Those objective criteria were subsequently set forth in the August 20 Notice.) With respect to "enhanced recovery units" required to establish a unit BPCL on or after February 1, 1976, DOE adopted in the February 1 Notice a new unitized property rule (10 CFR 212.75) which provided a means for preserving under the unit BPCL the benefits of the stripper well status of any leases included in the unit. Section 212.75 was subsequently amended, effective September 1, 1976, to provide a rule whereby unit BPCL's established on or after that date are permitted to reflect upper tier crude oil volumes previously produced and sold from the previously separate properties which comprise the unit. The result of these actions concerning unitized properties can be summarized as follows:

1. All unitized properties required to establish a unit BPCL on or after Sep-

tember 1, 1976. A unit based production control level must, in general be established as of the effective date of unitization, and the producer must treat the unit as a single property. Section 212.75 provides an exception to this requirement where (1) the producer has certified to DOE its intention to continue to determine volumes of upper, lower and stripper well crude oil separately for all properties that constitute the unitized property, and (2) the unitized property has not sustained a significant alteration in producing patterns. A significant alteration in producing patterns is defined in § 212.75 as the occurrence of either (a) the application of extraneous energy sources by the injection of liquids or gases into the reservoir, or (b) the increase in production allowables for any property that comprises the unitized property. Once a significant alteration in producing patterns has occurred, a unitized BPCL must be established.

Regardless whether established as of the effective date of unitization or as of the time that a significant alteration in producing patterns occurs, a unit BPCL established on or after September 1, 1976 is the sum of (1) the total average monthly production and sale of old crude oil during the 12-month period immediately preceding the establishment of a unit BPCL, from all the properties that constitute the unitized property plus (2) the average monthly production and sale of crude oil during the 12-month period immediately preceding the establishment of a unit BPCL, from all stripper well properties—qualified as such prior to the establishment of a unit BPCL—that constitute the unitized property.

Once a unit BPCL has been established it may be eligible for adjustment under § 212.76. In determining upper tier crude oil volumes each month following the establishment of a unit BPCL, the producer measures the entire current monthly production

Such certifications should be made pursuant to 10 CFR 205.90 and filed with the Deputy Assistant Administrator for Compliance, DOE, 2000 M Street, N.W., Washington, D. C. 20461.

and sale of crude oil from the unit and compares that volume against the unit BPCL. Current monthly production and sale volumes in excess of the unit BPCL qualify for treatment each month as new crude oil produced and sold from the unitized property unless there is a cumulative deficiency.

Section 212.75 also contains provisions for determining volumes of imputed new crude oil and volumes of imputed stripper well crude oil produced and sold each month for a unitized property for which a unit BPCL is established on or after September 1, 1976. Volumes of imputed new crude oil may be sold each month at a price not to exceed the upper tier ceiling price; volumes of imputed stripper well crude oil may be sold each month at exempt prices. Imputed new crude oil is a number equal to the average monthly production and sale of new (and released, if any) crude oil during the 12-month period immediately preceding the establishment of a unit BPCL, from all the properties that comprise the unitized property. Imputed stripper well crude oil is a number equal to the average monthly production and sale of crude oil during the 12-month period immediately preceding the establishment of a unit BPCL, from all previously qualified stripper well properties that constitute the unitized property. In the case of some stripper well properties, the 12-month period immediately preceding the establishment of a unit BPCL may include some period of time (up to eleven months) during which the stripper well property had not yet qualified as such.

2. *Enhanced recovery unitized properties required to establish a unit BPCL on or after February 1, 1976 and before September 1, 1976.* Section 212.75, adopted on February 1, 1976, is applicable only to enhanced recovery unitized properties which established a unit BPCL on or after February 1, 1976. Section 212.74(a) required that the unitized property be treated as a single DOE property and a unit BPCL established "as of the date of implementation of enhanced recovery operations on a unit or as of the date production patterns with respect to individual leases within a unit are substan-

tially altered (which ever date occurs first) * * *." However, § 212.75 did not, until September 1, 1976, contain a definition of "significant alteration in producing patterns." Accordingly, for any enhanced recovery unit formed during that time the producer was permitted to continue determinations of upper and lower tier crude oil volumes on a lease-by-lease basis until such time as enhanced recovery operations had begun. After such an occurrence, however, the unitized property was required to be treated as a single property and a unit BPCL had to be established. The unit BPCL was determined to be the sum of (1) the total average production and sale of old crude oil during the 12-month period immediately preceding the establishment of a unit BPCL, for all properties that constitute the unitized property, plus (2) the average monthly production and sale of crude oil during the 12-month period immediately preceding the establishment of a unit BPCL, from all previously-qualified stripper well properties that constitute the unit. After a unit BPCL had been established, the producer was required to compare the total production and sale of crude oil from the unitized property with the unit BPCL to determine current volumes of new crude oil. Section 212.75 as in effect from February 1, 1976 until August 31, 1976, contained a provision, similar to the current provisions for imputed stripper well crude oil, whereby certain previously-qualified volumes of stripper well crude oil could be sold from the unit each month as upper tier crude oil. It did not, however, include a provision similar to the current provision for imputed new crude oil.

With respect to any enhanced recovery unitized property formed during the period February 1, 1976 to September 1, 1976, for which a unit BPCL was not established, the current definition of "significant alteration in producing patterns," adopted in the August 20 Notice and effective September 1, 1976 is applicable effective September 1, 1976. Accordingly, if such an alteration in producing patterns (as that term is now defined in § 212.75) did occur prior to September 1, 1976, the unitized property must be

treated as a single property and a unit BPCL must be established under § 212.75 as of September 1, 1976, if the producer had not begun to treat the unit as a single property as of the time that a significant alteration in producing patterns occurred. If such an alteration in producing patterns has not occurred as of September 1, 1976, but does occur subsequent to September 1, 1976, the unitized property must at that time be treated as a single property and a unit BPCL must be established, and the provisions of § 212.75 then in effect shall apply. Of course, once a unit BPCL has been established, it may be eligible for adjustment under § 212.76.

3. *All unitized properties required to establish a unit BPCL prior to February 1, 1976 and unitized properties required to establish a unit BPCL prior to September 1, 1976.* Determinations of new, released and stripper well crude oil for units formed prior to the date on which unit BPCL regulations were adopted (February 1, 1976 for enhanced recovery units and September 1, 1976 for all units) are subject to the provisions of "DOE Ruling 1975-15" as modified on February 1, 1976. Accordingly, all such units formed during or after 1972 were required to calculate a BPCL by aggregating the BPCL's of all the participating properties as such time as significant changes in the unit's producing patterns occurred (and with respect to enhanced recovery unitized properties beginning February 1, 1976, as of the date of implementation of enhanced recovery operations). To the extent that a unit BPCL was required to be established prior to the effective date of any applicable unit BPCL regulation, the aggregation of BPCL's pursuant to "Ruling 1975-15" did not afford any means to reflect the prior stripper well lease status or production and sale of volumes of new or released crude oil of the previously separate properties which comprise the unit. Although a regulatory definition of "significant alteration in producing patterns" was not provided until September 1, 1976, that definition will be considered as guidance in audits and compliance cases in determining whether a significant alteration has occurred with re-

spect to such units. DOE will, however, on a case-by-case basis, permit unit operators to justify the establishment of the date of significant alteration in producing patterns in such units on reasonable bases other than those specified by the present definition. If no such alteration has occurred as of September 1, 1976, determinations of upper tier and stripper well crude oil volumes may continue to be made on a lease-by-lease basis until such time as a significant alteration does occur, at which time the unitized property must be treated as a single property and a unit BPCL must be established. As of the time that a unit BPCL is established, the provision of § 212.75 then in effect are applicable, and the unitized property may be eligible for a BPCL adjustment pursuant to § 212.76.

B. UNITIZATION OF TWO OR MORE PREVIOUSLY-QUALIFIED STRIPPER WELL PROPERTIES

Effective February 1, 1976 (with respect to enhanced recovery units for which a unit BPCL is established after that time) and effective September 1, 1976 (with respect to any unitized property for which a unit BPCL is established after that time), § 212.75 provides a mechanism to ensure that producers of crude oil from previously-qualified stripper well properties will not be deterred for economic reasons from entering the unit. This mechanism provides generally that an amount equal to current volumes of crude oil produced from participating stripper well properties may continue to be sold from the unit as stripper well crude oil after the establishment of a unit BPCL. (A similar rule, effective September 1, 1976, is designed to encourage producers of new crude oil to participate in the unitization.)

DOE has determined that this mechanism is the most effective method to remove the disincentive to unitization by producers of stripper well crude oil. The unit BPCL regulations do not, however, permit the unitized property to qualify as a stripper well property until the unitized property itself has sustained an average daily production of 10 barrels or less per well for 12

consecutive months following the establishment of a unitized BPCL. There are basically two reasons for this policy.

First, as noted above, DOE believes that the concept of "imputed stripper well crude oil" is adequate to ensure the participation in a unitized project and continued production of crude oil from previously-qualified stripper well properties.

Second, to permit a unit to qualify as a stripper well property on the basis of the production characteristics of its participating properties would likely encourage the selective unitization of marginal and non-marginal properties merely to obtain exempt stripper well property status for other than truly marginal properties. Such a result would obviously not comport with the congressional policy behind the exemption contained in the Energy Conservation and Production Act (ECPA, Pub. L. 94-385).

The only appropriate exception to this policy would appear to be for a unitized property in which all participating properties have previously qualified as stripper well properties. In such case, under a proposal set forth in a contemporaneous Notice of Proposed Rulemaking, the unitized property would be treated as a stripper well property as of the effective date of unitization.

V. APPLICABILITY OF THE STRIPPER WELL PROPERTY RULE TO CONDENSATE PRODUCED FROM GAS WELLS

Since January 1, 1975, a producer may not include gas wells in the calculation of a property's per-well average daily production to determine whether the property qualifies as a stripper well property. (40 FR 40818, September 4, 1975.) In order to resolve the uncertainty that had arisen due to diverse state criteria for classifying producing wells as either gas wells or oil wells, DOE undertook in the August 20 Notice to provide a functional test whereby producers might be able to determine whether a particular well may be considered an "oil well" for purposes of the stripper well property rule, regardless whether the particular well has been classified as a gas well

for other purposes by the state regulatory authority.

DOE preliminarily concluded in the April 13 Notice that the inclusion of a well for purposes of determining stripper well property qualification is only prohibited to the extent that the well provides only non-associated production of natural gas and condensates, and that if a well produces some crude oil, the well would qualify as an oil well for purposes of the stripper well property rule. After soliciting comments on this distinction, DOE concluded in "DOE Ruling 1977-1" that:

If a well produces from an associated reservoir (i.e., a reservoir in which gas occurs in association with crude oil), that well may be included to determine if the property is a stripper well property only if crude oil is produced from that well. If only condensate is produced, in association with the gas, the well may not be included to determine if the property is a stripper well property. On the other hand, if a well is producing non-associated gas (i.e., free gas not in contact with crude oil in the reservoir), or only natural gas (even if from an associated gas reservoir), that well may not be included as a producing well because it does not produce crude oil.

DOE has continued to receive inquiries, however, concerning the crude oil/condensate distinction, which suggest that there is an inconsistency between the distinction drawn in "Ruling 1977-1" and the definition of "crude oil" in 10 CFR 212.31, which includes condensate:

"Crude oil" means a mixture of hydrocarbons that existed in liquid phase in underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities. "Crude oil" includes condensate recovered in associated and non-associated production by mechanical separators, whether located on the lease, at central field facilities, or at the inlet side of a gas processing plant. (Emphasis added.)

The definition of "crude oil" in § 212.31 includes condensate in recognition of the treatment of condensate as crude oil by producers on a historical pricing basis. (See 40 FR 40818, September 4, 1975.) However, DOE recognizes that some gas wells produce condensate, which under the § 212.31 definition is treated as "crude oil" for purposes of Subpart D, but which does not constitute crude oil for purposes

of the crude oil/condensate distinction which is used to differentiate oil wells from gas wells for purposes of stripper well property qualification.

Thus, a distinction between crude oil and condensate is necessary for purposes of determining whether the particular well from which the condensate is produced may be counted in determining the property's per-well average daily production for purposes of the stripper well property rule. For all other purposes, condensate, whether recovered in associated or non-associated production, is treated as crude oil under Subpart D in determining a first sale price.

DOE understands that associated production occurs if hydrocarbons in both liquid and gaseous states exist together in one reservoir. Thus, a reservoir in which gas occurs in solution with crude oil would produce crude oil and gas in "associated" production. An oil reservoir having a gas cap normally produces crude oil and gas in associated production but could (in theory though not ordinarily in practice) produce crude oil and gas in either associated or nonassociated production depending on the manner in which the well has been completed in the reservoir. Non-associated production is understood to occur when both liquid and gaseous hydrocarbons are jointly produced from a reservoir in which they exist in the reservoir only in a gaseous state.

The further tests described below are not fully definitive, but should in most circumstances provide an adequate basis for distinguishing "associated" from "non-associated" production for purposes of determining if the particular well may be included in determining a property's per-well average daily production. Generally, each of the following tests should indicate whether the condensate is recovered in "associated production."

A. Phase test. DOE does not expect that a phase test will actually be conducted for each well, or reservoir, and none is required. However, if such tests have been conducted or if phase behavior is inferable from other relevant well or reservoir data, a valid determination can probably be made. If as the hydrocarbon stream rises from

the reservoir to the surface a bubble point occurs (that is, the entrained dissolved gas separates from the liquid into bubbles), the joint production of oil and gas is said to be "associated." If, under production conditions of pressure reduction at reservoir temperature the hydrocarbon stream exhibits a dewpoint, the joint production of fluid and gas is said to be "non-associated."

B. Production method test. If they hydrocarbon stream is raised to the surface by pumping, the joint production of liquid and gas is almost surely "associated." If the stream rises to the surface by its own underground pressure, the joint production is more likely "non-associated" than "associated." This delineation is particularly true for old wells and reservoirs, which generally correspond to marginal situations.

C. Gravity test. If the production at the surface is a single liquid stream having a gravity of 45° API or lighter, that stream would be generally deemed pure condensate (although DOE recognizes that there are a few crude oils in the 50° to 60° range), and the production would be deemed to be "non-associated." If production at the surface consists of two streams, one having a gravity heavier than 45° API (crude oil) and the other 45° API or lighter (condensate), that joint production would indicate "associated" production.

[42 FR 4409, Jan. 25, 1977]

RULING 1977-3—CARGO SALES

Facts. Firm A is a reseller of covered products, engaged principally in the resale of those products through several terminals, which receive covered products and from which sales are made and products distributed.

In addition to these sales, Firm A is engaged in buying and reselling cargo lots of covered products, a practice known in the industry as "trading". Typically, a transaction of this type involves an agreement between Firm A and Firm B for a specified quantity of product to be furnished to Firm B at a set price on a specific date Firm A arranges to purchase the product from Firm C for delivery to Firm B. The

product never physically enters into Firm A's terminal or distribution system. Firm B is not a regular purchaser from Firm A's terminal.

Firm A made sales of this type prior to May, 1973 and such sales have always been accounted for as separate transactions under Firm A's historical accounting system. Traditionally, these purchases and resales have had a lower margin than those made within Firm A's normal distribution system.

They are high volume sales and the cargoes involved are always identifiable with a specific purchaser. Prices charged in such resales have always been determined exclusively with respect to the cost of the cargo concerned and without regard to the cost or selling prices of product held in inventory by Firm A in its terminals. "Trading" transactions of the nature described above often occurred quite rapidly, with particular cargoes being purchased and resold on the same day, sometimes within less than an hour.

Issue. May Firm A, under the Mandatory Petroleum Price Regulations applicable to resellers of covered products (Subpart F of 10 CFR, Part 212) and prior to the adoption of the "separate inventory" rule effective May 1, 1976, calculate the increased costs of the cargo sold to Firm B separately from the increased costs of the same product purchased and held for resale through its normal terminal and distribution system?

Ruling. Firm A may, prior to the adoption of the "separate inventory" regulations, separately calculate the increased costs of the cargo lot of product purchased and resold to Firm B.

Maximum prices are determined by resellers pursuant to § 212.93(a) which has always provided that "[a] seller may not charge a price for an item . . . which exceeds the weighted average price at which the item was lawfully priced by the seller in transactions with the class of purchaser concerned on May 15, 1973, plus an amount which reflects, on dollar-for-dollar basis, the increased product costs concerned." Section 212.92 defines "increased product costs" as "the difference between the weighted average

unit cost of a product in inventory and the weighted average unit cost of that product in inventory on May 15, 1973." Pursuant to an amendment adopted effective May 1, 1976 (41 FR 19110, May 10, 1976), "product in inventory" is defined in § 212.92 as:

... at the option of the seller concerned, either: (1) The entire, undivided stock of a covered product, no matter where located, purchased and held for resale by the seller concerned; or (2) that portion of the total stock of a covered product purchased and held for resale by the seller concerned which constitutes a separate inventory under generally accepted accounting principles consistently and historically applied by the seller concerned. . . .

Under that definition, the cargo lot of product sold to Firm B would represent a "separate inventory," as to which a separate calculation of increased costs of product would be permitted.

Prior to the May 1, 1976 amendment, the price regulations applicable to resellers did not include a definition of "product in inventory." In adopting the May 1, 1976 "separate inventory" amendment, DOE stated:

Prior to today's amendment, DOE interpreted "product in inventory" to mean the seller's entire undivided stock of a product held for resale.

Even under that interpretation, however, it is not appropriate to regard the cargo lot, in the circumstances described above, as constituting a part of Firm A's "entire undivided stock of a product held for resale." This is because cargo lot resales of the type in which Firm A was engaged have, by their particular nature, never been part of a seller's stock of a product held for resale through the seller's normal distribution system but, of practical necessity, have always been accounted for separately.

The cargo sales represent isolated transactions. Firm A's cost and pricing decisions with regard to the purchases and resales made in the normal distribution system have always been made without taking into account the cost or price of purchases and resales such as the one to Firm B. Indeed, because of the relative speed with which such "trading" transactions often took

place, it would have been impracticable, if not impossible, for Firm A to derive a weighted average cost of its terminal inventories, together with the cargo lot in question, prior to the resale of the cargo lot. This is particularly true when such transactions involve several different cargo lots on the high seas which may or may not be in transit at the same time depending on shipment delays caused by weather or other factors.

Moreover, because such cargo lots were purchased and priced for resale without regard to the cost of Firm A's product held for resale in terminals, to have made such a weight-averaging could have seriously distorted Firm A's pricing with respect to its terminal sales. The historically lower margin on this type of sale, reflecting the lower costs associated with these resales, is further indication of the difference in treatment accorded these sales.

[42 FR 4833, Jan. 26, 1977]

**RULING 1977-4—INTERAFFILIATE TRANSACTIONS,
TIMING OF LANDED COST**

Facts. Firm X purchases foreign crude oil from its affiliate. The crude oil is loaded in May 1974 at the country of origin and is delivered in the U.S. in June 1974. Firm X takes title and custody of the oil and accrues the cost of the crude oil for accounting and tax purposes at the time of loading. This is the firm's customary procedure, which it has consistently and historically applied.

Issues. When may Firm X incur the cost of such crude oil for purposes of § 212.83 (now § 212.82)?

Ruling. Firm X is permitted to incur the applicable cost as part of its "landed cost" when the cost is recognized pursuant to the firm's customary accounting procedures generally accepted and consistently and historically applied, in this case, May 1974.

In October 1974, DOE adopted specific regulations governing the time when such costs may be incurred. In particular § 212.84(h) provides:

(h) *Timing.* The landed cost shall be considered to be incurred when that cost is recognized as having been incurred by application of the refiner's customary accounting procedures generally accepted and consistently and historically applied * * *

In adopting § 212.84, DOE stated that:

To the extent that the standards in these regulations are applied to months earlier than October 1974, they are not intended to alter or to expand in any way the authority which DOE presently has under its existing regulations. Rather the proposed regulations are interpretive in nature, setting out with more precision the methods for measurement of actual landed costs, which is required in any application of § 212.83(e)¹

DOE will compute representative arm's-length prices for the period from October 1973 through September 1974 and use such prices as standards for disallowing costs pursuant to § 212.83(e) as it has always read. Because § 212.83 provided only general guidance, however, and because of great price uncertainty during much of this period, DOE may allow somewhat greater leeway in determining appropriate transfer prices for this period than is provided for in the new regulation and DOE may permit some form of offset. In addition, the form of remedy may differ from that for the prospective months. (emph. supp.) 39 FR 38365

Thus, in inter-affiliate transactions preceding adoption of § 212.84, disallowances regarding the landed costs of crude oil have been generally measured in accordance with § 212.84. Accordingly, DOE will not initiate disallowances or other enforcement procedures for the period prior to October 1974 where costs have been incurred on the basis set out in § 212.84(h). If a different rule were applied, e.g., if the time of landing or loading were specified for all refiners, firms would be required to make a further accounting adjustment to take account of the difference in treatment before and after October 1974. The net result of any such adjustment would be to allow refiners to recover the same total cost whether or not refiners were permitted to use their customary accounting practices for the period prior to October 1974.

¹Section 212.83(e) now § 212.83(b) provides that: Whenever a firm uses a landed cost which is computed by use of its customary accounting procedures, the DOE may allocate such costs between the affiliated entities if it determines that such allocation is necessary to reflect the actual costs of these entities or the DOE may disallow costs which it determines to be in excess of the proper measurement of costs.

The use of customary accounting procedures in this connection also accords with DOE's previous experience in adopting § 212.84(h). When that regulation was issued, DOE stated that:

DOE [had] originally proposed that landed costs to a U.S. affiliate would not be considered to be incurred for calculating increased costs before the crude oil was physically landed in the United States. This did not conform with most companies' customary accounting practices, which accrue the cost of acquisition upon the passage of title, which usually occurs at the time of loading in a foreign port. The final rule considers landed costs to be incurred when they are recognized by the firm's customary accounting procedures generally accepted and consistently and historically applied. Adoption of this rule avoids imposing on the companies an additional burden of establishing and maintaining new procedures and records in order to comply with the regulation. It should therefore facilitate the rapid provision to DOE of transaction information. Because records for DOE should conform with the companies' normal accounting practice, auditing should also be easier. 39 FR 38365

It should be emphasized that this ruling is premised on the fact that Firm X's customary accounting procedures for the period prior to October 1974 have been consistently and historically applied by the firm. Moreover, such accounting practices must be considered generally accepted either for purposes of reports to stockholders or for accrual of the expense in determining United States income tax liability.

[42 FR 12161, Mar. 3, 1977]

RULING 1977-5—APPLICATION OF THE DEFINITION OF "TRANSACTION" FOR PURPOSES OF COMPUTING WEIGHTED AVERAGE MAY 15, 1973, PRICES

I. INTRODUCTION

The purpose of this ruling is to interpret the term "transaction," as it is defined in the DOE price regulations applicable to refiners, resellers/retailers and natural gas processors. The term is an important element in determining current maximum allowable prices because, under applicable regulations, current maximum allowable prices are based upon the weighted average prices at which products are lawfully priced in "transactions" with the

class of purchaser concerned on May 15, 1973.

The ruling discusses generally the role of the "transaction" definition in the price regulations and its application in various situations, including those in which covered products were furnished pursuant to written fixed-price contracts, pursuant to written variable-price contracts, or in the absence of any written contract. For the reasons discussed below, presumptions are established that "transactions" occur (a) at the time both parties have signed a written contract that specifies a fixed price at which a covered product will be furnished, (b) at the time the price is fixed with respect to a particular delivery of a covered product pursuant to a written variable-price contract, and (c) at the time of delivery of a covered product when there is no written contract.

Clarification of the term "transaction" is needed, in part, because of differing definitions of "transaction" and related terms which have applied to the petroleum industry under different phases of price control programs since 1971, as reviewed below. Clarification is also needed because of certain problems concerning application of the "transaction" definition which did not become fully apparent until DOE had undertaken extensive audits of records of refiners and resellers/retailers. In addition, DOE received a request for a formal ruling, following a decision by DOE's Office of Exceptions and Appeals on an appeal from a remedial order that related to the transaction definition. The decision quoted a portion of the remedial order in which the term "transactions" occurring on May 15, 1973, was interpreted to include two elements: (1) Contracts entered into on May 15, 1973, and (2) actual "sales" (i.e., shipments) which occurred on that date whether pursuant to a pre-existing contract or otherwise. *Gulf Oil Corp.*, 3 DOE §80,636, May 27, 1976.

II. THE PURPOSE OF THE "TRANSACTION" DEFINITION

A. GENERAL

In order to determine the maximum allowable prices applicable in sales of a particular product to a particular class of purchaser (other than in first sales of crude oil), a seller of a covered product must first determine the "weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973."¹ In general, the maximum allowable price is the "May 15, 1973, weighted average price," thus defined, plus increased product costs and allowable increased non-product costs.²

DOE regulations also provide that, if no "transaction" occurred with respect to a particular product on May 15, 1973, the most recent day preceding May 15, 1973, when a "transaction" occurred shall be used for purposes of computing the maximum allowable price (§§ 212.83(a)(3) and 212.93(d)).

"Transaction" is defined in 10 CFR 212.31 as follows:

"Transaction" means an arm's-length sale between unrelated persons which are not members of a controlled group . . . and is considered to occur at the time and place when a binding contract is entered into between the parties.

Thus, the definition of "transaction" serves to help isolate and identify the particular commercial events occurring on or most recently prior to May 15, 1973. The prices in such "transactions" are then to be used in determining the "May 15, 1973, weighted average price."

B. SIGNIFICANCE OF THE MAY 15, 1973, BASE DATE

A seller's "May 15, 1973, weighted average price" for a product in sales to a class of purchaser determines, in effect the maximum price in all future

sales of that product to a particular class of purchaser. This result occurs because only those increased costs incurred since May 1973 generally may be added to May 15, 1973, weighted average prices to determine maximum allowable prices.

The May 15, 1973, base date, which coincides with the base date for producers for determining lower-tier crude oil price ceilings,³ was selected for a number of reasons, including the general stability of prices in the petroleum industry in mid-May 1973, following an initial round of crude oil price increases earlier in 1973 and prior to a second round of price increases that began on June 1, 1973.⁴ The month of May 1973, was the last full month prior to the Cost of Living Council's Phase III price freeze and subsequent price control programs, and thus represents the most recent period in which relatively normal market conditions in the petroleum industry prevailed.⁵ A base period in which relatively normal market conditions prevailed was necessary so that the regulations would reflect relatively normal "margins." Further, because classes of purchaser are determined and fixed with reference to base period transactions, a period of relatively normal market conditions would permit such classes to reflect normal or "customary" price differentials between a firm's purchasers.⁶

It should also be noted in this connection that the increased costs which may be added to the May 15, 1973, selling price to determine the maximum allowable price are generally those which have been "incurred since May 15, 1973, or those which represent an average increase over the aver-

¹10 CFR 212.73.

²Historical Working Papers on the Economic Stabilization Program, Part II, pp. 1266-1267.

³Although mandatory price regulations had been re-imposed on refiners during Phase III, these regulations were relatively more flexible than those which prevailed during Phase II.

⁴See definitions of "class of purchaser" in 10 CFR 212.31.

⁵10 CFR 212.82 (definition of "maximum allowable price" for refiners) (emphasis added). See also 10 CFR 212.93 (price rules for resellers and retailers) and 10 CFR 212.163 (price rules for first sales of natural gas liquids and natural gas liquid products).

⁶Ibid.

age costs in the month of May, 1973.⁷ This coincidence of the base period price level and the starting date for calculating increased costs fulfills, as far as possible, the general intent of the price regulations to limit current prices to levels established by the market on May 15, 1973, plus increased costs incurred since that date.

C. MECHANISMS FOR EXCLUSION OF PRICES NOT APPROPRIATELY REPRESENTATIVE OF MAY 15, 1973 MARKET CONDITIONS

As noted above, the price regulations look to May, 1973, as the appropriate time for measuring base-period price levels, and the regulations reflect several mechanisms whereby, of the hundreds or thousands of potential indicia of May, 1973, price levels for each product and class of purchaser, only a limited number are taken into account.

Once having determined, based on the foregoing considerations, that May 1973, was an appropriate base price and base cost period for purposes of the current petroleum price control program, the Cost of Living Council selected as the "base period" for prices the single date of May 15, 1973 (or the next preceding day on which a "transaction" occurred, if no "transaction" occurred on May 15, 1973), rather than a longer reference period. The use of a single day appears to have been intended to permit relative simplicity in calculating and auditing weighted average prices in the base period, as the number of base period "transactions" was limited thereby to a relatively small and manageable number. A great many more "transactions" might have been involved if, for

example, the period for establishing prices had been a week or a month in length.

Secondly, only a single "transaction" on (or most recently prior to) May 15, 1973, is needed to establish the weighted average price to a class of purchaser, with "weight averaging" required only if more than a single "transaction" occurred on May 15, 1973 (or on the most recent date prior to May 15, 1973, on which at least one transaction did occur).

The time when a "transaction" occurs is important, therefore, in determining whether the price in that "transaction" is to be appropriately regarded as a May 15, 1973 (or earlier) price. If a "transaction" occurred after May 15, 1973, the price in that transaction is automatically omitted from the May 15, 1973 price calculation. If a "transaction" occurred prior to May 15, 1973, however, the price in that transaction is included in the May 15, 1973, selling price calculation, unless it is "screened out" of the calculation by a price in a "transaction" which occurred closer to (but not after) May 15, 1973, with the class of purchaser concerned. This "screening out" process thus serves to identify those prices in actual transactions by the seller concerned which occurred on or as closely prior to May 15, 1973, as possible, and thus to reflect, as nearly as possible, the seller's May 15, 1973, market prices.

As is discussed more fully below, the definition of "transaction" as occurring at the time a binding contract is entered into also reflects an effort to exclude, insofar as possible, prices in shipments or deliveries of products which occurred on or before May 15, 1973, but which were made pursuant to old, fixed-price contracts, and which were therefore not thought to be reasonably representative of May 15, 1973, market prices.

The principal focus of this ruling is the application of the definition of "transaction" in the case of variable-price contracts pursuant to which covered products were supplied at prices that would vary from month-to-month or shipment-to-shipment. This ruling concludes that the date of entry into a contract that lacks a fixed price term

⁷For resellers and retailers, May 15, 1973, is the starting point for measuring increased product costs (§ 212.92) and increased product costs (§ 212.93(b)). However, increased non-product costs are limited to the maximum cent-per-gallon amounts specified in § 212.93(b) regardless of the actual amount of increased non-product costs incurred. For refiners, increased costs means either those which have been incurred since May 15, 1973, or the increase over the average costs for the month of May 1973, depending upon the cost category concerned. See, e.g., § 212.83(c)(2)(iii)(E).

does not constitute the date on which a "transaction" occurred for purposes of determining whether the "price" in that transaction is to be included in the May 15, 1973, selling price calculation. Rather, DOE has concluded that the time when a price is fixed for a particular delivery pursuant to a variable price contract is the date when a "transaction" occurs. This conclusion is based on the fact that the purpose of fixing a date on which a "transaction" occurs is to determine whether the price in that transaction is to be included in a seller's calculation of prices intended to be reasonably representative of May 15, 1973 (or earlier) market levels. A variable price contract does not fix a price at the time it is entered into, but operates instead as a framework for fixing prices from time to time, as deliveries are made under the contract. DOE has concluded that the time when the price is fixed with respect to a particular delivery under a variable-price contract is the event which is most appropriately regarded as determinative of when a "transaction" occurs for purposes of determining, in turn, whether the price in that "transaction" is appropriately to be taken into account as a May 15, 1973 (or earlier) price that is reasonably representative of market levels. The date of entry into a variable-price contract is not treated as the date on which a "binding contract" is entered into because of the absence at that time of any binding obligation to supply product at a fixed price. Instead, the entry into a binding contract is considered to occur when a binding obligation to supply and to purchase a particular delivery of product at a fixed price arises. At the time such prices with respect to particular shipments are fixed, "subsidiary contracts" are entered into that supply a price which can appropriately be regarded as representative of market levels.

This interpretation is entirely consistent with the language of the regulations, which (1) specify that a "transaction" is deemed to take place "at the time and place when a binding contract is entered into between the parties" (10 CFR 212.31); and (2) include only those transactions on (or

before) May 15, 1973, in which a product was "lawfully priced" to a class of purchaser (10 CFR 212.83, 212.93 and 212.163). Thus, to be a transaction that can be used for purposes of computing a seller's maximum allowable price there must be a "binding contract" on or before May 15, 1973, in which a product was "lawfully priced." Prices in "transactions" (i.e., in deliveries) made pursuant to long term variable-price contracts are not "screened out" of the May 15, 1973, selling price calculation simply because they were made pursuant to an overall contract entered into at some earlier date. Conversely, the date when a variable price contract is entered into does not constitute a "transaction" because there is no "binding contract" on that date to supply product at a fixed price. Thus, DOE regards each of the various prices fixed for particular deliveries pursuant to variable-price contracts as being, in general, reasonably representative of current market conditions. This treatment is consistent with not considering prices in shipments or deliveries pursuant to fixed price contracts representative of current market conditions, since under such contracts the price for all deliveries is fixed at the time the contract is entered into and is maintained without regard to changes in market conditions for the duration of the contract.

D. RATIONALE FOR THE "BINDING CONTRACT" DEFINITION OF TRANSACTION IN THE CONTEXT OF FIXED-PRICE CONTRACTS

As noted above, a transaction "is considered to occur at the time and place when a binding contract is entered into between the parties."

This "contract" basis for establishing the date of transactions was first adopted for purposes of petroleum price regulations by the Cost of Living Council at the beginning of Phase IV of the Economic Stabilization Program.⁶ The same definition of "trans-

⁶ 6 CFR 150.352, 150.358(g), 38 FR 22536 (August 22, 1973).

action" was later readopted by FEO and DOE as successor agencies.⁹

This "contract" basis for determining when a "transaction" occurs is distinguished from the date-of-shipment basis that was used for the same purpose in certain phases of earlier price control programs administered by the Cost of Living Council.¹⁰

A "contract" rather than "shipment" basis for determining when a transaction occurred appears to have been adopted for several reasons. A principal reason related to the fact that petroleum prices increased significantly in the early months of 1973, as noted above. It was therefore thought that prices specified in contracts entered into on May 15, 1973, would more accurately reflect market levels on that date than would prices charged for shipments made on May 15, 1973, since many shipments would presumably have been made under fixed-price contracts entered into in previous months or years. The problem of establishing a fair and representative base period price in the context of a generally rising market was magnified by the fact that, in 1973, long-term fixed-price supply contracts were common in the petroleum indus-

try, due to the general price stability which had previously prevailed. Use of a contract basis for determining when a transaction occurs was therefore apparently intended, insofar as possible, to screen out from May 15, 1973, price calculations those prices resulting from pre-existing fixed-price contracts, which were not representative of May 15, 1973, market levels.

Another consideration appears to have been the fact that regulated prices under the June 1973 freeze were determined by reference to prices charged in shipments made during the period June 1-8, 1973, (the same "shipment" rule as had been used for determining prices during the Phase I freeze). Shipments made between June 1 and June 8, 1973, could have included shipments made pursuant to contracts entered into after May 15, 1973, as well as shipments made pursuant to contracts entered into on or before May 15, 1973. If a "shipment" basis had been adopted under the Phase IV petroleum regulations, together with a May 15, 1973, base period, prices charged in such shipments could have reflected only contracts entered into on or before May 15, 1973. Given the rising market, a "shipment" basis for May 15, 1973, transactions might therefore have tended generally to set a somewhat lower base period price level for Phase IV than had been set under the preceding freeze, which used a "shipment" basis for June 1-8, 1973, transactions. Thus, adoption of a "contract" basis for transactions and a May 15, 1973, base period minimized the possibility of price rollbacks in August, 1973, when the freeze ended and Phase IV began.

The foregoing considerations indicate that the purpose of the "contract" basis for "transactions" was to afford a base period price level which reflected, as closely as possible, actual market level prices as of May 15, 1973. This differs from a "shipment" basis for "transactions" which, if used, would have included prices at which product changed hands on May 15, 1973, some of which were established under old long-term fixed-price contracts. To the extent such contracts were entered into long before May 15,

⁹10 CFR 212.31, 212.82(f), 212.93, 39 FR 1924 (January 15, 1974).

¹⁰A "shipment" basis (e.g., a "transaction" is "considered to occur at the time of shipment in the case of products") was used for purposes of the Phase I freeze, the freeze which ended Phase III, the Phase IV regulations of general applicability (quoted), and FEO's temporary freeze on diesel fuel prices in February 1974. See definitions of "transaction" in: Econ. Stab. Circ. No. 101, Para. 302, 36 FR 18739, September 21, 1971; 6 CFR 140.2, 38 FR 15768 (June 15, 1973); 6 CFR 150.31, 38 FR 21592 (August 9, 1973); Appendix A to 10 CFR Part 212, 39 FR 4784 (February 7, 1974). The "contract" basis was, however, used in the definition of "transaction" in Phase II. 6 CFR 300.5, 36 FR 23974 (December 16, 1971). The "shipment" basis for transactions for purposes of the Phase IV regulations of general applicability was accompanied by several interrelated regulatory provisions not present under the current price control program, such as the "contracts" provision in 6 CFR 150.76 and the "adjusted freeze price rule" (see fn. 11, of this ruling) which, in effect, allowed the use of more recent price levels than permitted by a strict "shipments" test.

1973, they would not have been likely to reflect May 15, 1973 market levels.

A further consideration relevant to this conclusion is that the definition of "transaction" includes only May 15, 1973, prices which were arrived at through arm's-length bargaining by unrelated persons. By excluding prices determined other than in arm's-length transactions, the intention to consider actual, competitive market prices on May 15, 1973, in establishing base period price levels, is further confirmed.

Finally, it is relevant to this discussion to point out that the "shipment" basis for "transactions" used in Phase I of the Economic Stabilization Program, in the freeze which terminated Phase III, and in the temporary freeze on diesel fuel prices instituted by FEO in February, 1974 (see fn. 10, above) included a "10% rule," under which the freeze price was defined as the highest price at or above which at least 10% of the commodities or services concerned were priced by the seller in transactions with the class of purchaser concerned during the freeze base period.¹¹ This "10% rule" evidently was intended to avoid the possibly numerous price rollbacks which would have been required if the freeze price had been the weighted average price at which shipments occurred during the freeze base period. Instead rollbacks were required only with regard to those relatively few prices in the base period which appeared anomalously high (i.e., which exceeded the highest price at or above which at least 10% of the products had been sold).

¹¹See, e.g., definition of "freeze price" in 6 CFR 140.2 (38 FR 15768, June 15, 1973). A "10% rule" was not included in the Phase IV price rules of general applicability, even though those rules included a "shipment" basis for transactions (see fn. 10, of this ruling), evidently because for purposes of that program the base price was the adjusted Phase III freeze price or the Phase IV base price, whichever was higher (6 CFR 150.73, 38 FR 21592, August 9, 1973), and because prices specified in contracts entered into before the Phase III freeze with respect to delivery occurring in Phase IV were specifically granted lawful status under Phase IV rules (6 CFR 150.56, 38 FR 21592, 38 FR 30266, November 2, 1973).

The absence of a "10% rule" under the current petroleum price control program further suggests that a "shipment" test as a general basis for determining when a "transaction" occurs under that program was deliberately rejected. A "shipment" basis without a 10% rule might lead to the following anomalous results: (1) A substantial proportion of prices reflected in "shipments" which exceeded the weighted average (which would have been lower than current market levels to the extent that it reflected shipments under fixed-price contracts) would have been rolled back (and in some cases rolled back, as previously noted, below the Phase III freeze level);¹² and (2) a substantial number of prices for "shipments" which were priced below the weighted average because of long-term fixed-price contracts could not have been increased to the level of the weighted average until the contracts which imposed these restrictions expired.¹³

III. APPLYING THE "TRANSACTION" DEFINITION

A. WRITTEN FIXED-PRICE CONTRACTS

As noted above, a determination as to when a "transaction" occurs must be made first in order to identify

¹²Of course, even under the "contracts" definition employed in the Phase IV petroleum price regulations, the possibility still existed that rollbacks would occur in some sellers' prices because a seller's weighted average price in transactions (i.e., contracts with established prices) on May 15, 1973, might be lower in a particular case than that seller's maximum lawful prices under the shipments test during the freeze ending Phase III. The fact is, however, that the likelihood of such rollbacks was minimized, as noted above, by use of a contracts rather than a shipments test on May 15, 1973, and by the ability of most sellers under the initial Phase IV petroleum price rules to pass through increased product costs incurred since May 15, 1973, in their selling prices.

¹³It should be noted in connection with weight-averaging to determine the May 15, 1973, selling price applicable to the product and class of purchaser concerned, that "spot" purchasers are normally in a different class of purchaser than long-term contract purchasers. See Section B of DOE Ruling 1975-2.

whether the prices in a particular "transaction" or "transactions" will be used to determine the May 15, 1973, selling price. If the date of a "transaction" is May 15, 1973, the price in that "transaction" is included in the determination of the May 15, 1973, selling price. If that date is prior to May 15, 1973, the price in that "transaction" could be included in the determination of the May 15, 1973, selling price, but only if there were no other "transactions" with the class of purchaser concerned after that date and before May 16, 1973.

By definition, a "transaction" occurs at the time a "binding contract" is entered into between parties. With respect to written contracts, therefore, a "transaction" will normally occur on the date on which the contract is signed by both parties or otherwise becomes legally binding. It should be noted that, with respect to long-term contracts, the date of entry into such binding written contracts is typically not the date the product was actually shipped to the purchaser.

As the foregoing review indicates, one of the principal purposes of the contract basis for determining when a transaction occurs was apparently to "screen out," insofar as possible, prices on May 15, 1973, which were not representative of May 15, 1973, market levels, i.e., to screen out prices charged in shipments made pursuant to old, fixed-price contracts in favor of prices specified in more recent contracts. Thus, a shipment or delivery pursuant to a fixed-price contract is not considered to be the time a "transaction" occurs (unless the shipment occurs at the same time the long-term contract is entered into); rather, the transaction occurs at the time a binding contract is entered into between the parties. Although the time that a written contract becomes binding can vary, depending on the conduct of the parties and the law of the state concerned, DOE will presume that written fixed price contracts become binding when both parties have executed the agreement. This presumption can be overcome by an appropriate showing that the contract became binding at some other time pursuant to the applicable laws of the jurisdiction concerned.

To the extent that there were any contracts which specified a fixed price, but did not specify definite volumes, the general considerations with respect to fixed price contracts, as discussed above, apply, and the date of entry into such a contract is regarded as the time when the "transaction" occurs. If it is necessary to weight average that price, the volume of the first delivery made pursuant to the contract is used. Since the volume figure used for purposes of weight-averaging serves simply to approximate the relative importance of the price charged with respect to the "transaction" concerned, the fact that the date of the first delivery under the contract varies from the date the fixed price contract was entered into and on which the "transaction" is therefore regarded to have occurred, does not result in any departure from the "market-level" pricing concepts discussed above, and is consistent with the language of the definition in 10 CFR 212.31.

B. WRITTEN VARIABLE-PRICE CONTRACTS

Contracts containing fixed price terms should generally not present problems in connection with the application of the definition of "transaction." Thus, for example, a binding contract entered into on May 15, 1973, pursuant to an arm's-length negotiation between unrelated persons, which contains a fixed price term, is clearly a base period "transaction" regardless of whether shipment pursuant thereto occurred on May 15, 1973, or at a later date, because a single price is specified in the contract as of the date the transaction occurs. Similarly, such a contract entered into on May 1, 1973, is a May 1, 1973, "transaction," and would be a base period "transaction" reflecting a base period price only if the seller concerned had no "transaction" which occurred after May 1 and before May 16, 1973, with respect to the product and class of purchaser concerned.

The use of a "contract" basis for "transactions" which, in turn, are used to calculate May 15, 1973, selling prices gives rise to certain problems the extent of which was not fully ap-

parent until DOE had gained wide experience in auditing records of refiners and resellers/retailers. Chief among these problems is the fact that many supply contracts in the petroleum industry do not have fixed price terms, but may refer to extrinsic price mechanisms, or to other future price determinants which were uncertain at the time the contracts were entered into. Such variable-price terms present special problems because the "screening out" process, which eliminates prices in "transactions" from consideration as May 15, 1973 prices, depending on the date the "transaction" occurred, assumes that a transaction which is included or excluded according to the date on which it occurred will entail a binding obligation as of that date to supply a covered product at a fixed price, which is then to be used for purposes of making the weighted average May 15, 1973, price calculation.

Information now available to DOE indicates that many long-term contracts for the sale of products entered into on or prior to May 15, 1973, employed price adjustment clauses which permitted the price charged in any given delivery of product pursuant to the contract to fluctuate with market conditions existing on the date of delivery. For example, such contracts might specify a base price or posting, possibly with a discount, plus a formula for price adjustments as certain published price reports changed. In such cases, on the day of entry of such contracts, insufficient information was provided within the written terms of the contract for use in computation of a weighted average price without reference to events occurring after the date of the contract. Price adjustment or price "escalator" clauses made it impossible on the date the "binding contract" was entered into to determine the price at which a covered product would change hands in the future.

The definition of "transaction" does not specifically address the question of contracts without fixed price terms and how these contracts are to be treated in calculating weighted average May 15, 1973, selling prices. This problem must be resolved in some appropriate manner, however, since the

calculation of the May 15, 1973, selling price is the foundation or starting point for determining maximum allowable selling prices under the DOE price regulations. DOE believes that the proper interpretation of the "transaction" definition with respect to a contract without a fixed price term is that such a variable-price contract is merely a general sales agreement which, because of its lack of a fixed price that would reflect market level prices on the date the contract was entered into, cannot be regarded as a "binding contract" for purposes of the definition of "transaction" and the computation of May 15, 1973, selling prices. Within the framework of such a general sales agreement, one or more subsidiary contracts occur, and they are presumed to have been entered into on the date the price becomes fixed with respect to a particular delivery. At the time a fixed price is specified with respect to a particular delivery pursuant to the terms of a general sales contract, a "binding contract" arises for purposes of the definition of "transaction."

Thus, for example, if a general sales contract with variable or unspecified price terms was executed on May 1, 1973, and pursuant thereto deliveries were made on May 10 and May 20, 1973 (with the prices for such deliveries fixed pursuant to the general sales contract by reference to posted price in effect on the date of delivery) the subsidiary contract of May 20 could not qualify as a base period "transaction" because it was entered into after May 15, 1973, but the subsidiary contract of May 10, 1973, could represent a base period "transaction" (at the price specified for the May 10 delivery) if there were no other "transactions" with respect to the product and class of purchaser after that date and before May 16, 1973. The general sales contract executed on May 1, 1973, falls as a base period "transaction" in this case because it lacks the fixed price data necessary for computation of a weighted average price.

C. NO WRITTEN CONTRACT

In the case of retailers, the distinction between "contracts" and "ship-

ments" is typically of little significance, as in most cases the normal cash or credit sales to consumers involve either an unwritten or written sales "contract" and a simultaneous "shipment."

The "binding contract" referred to in the transaction definition need not be written, of course, but may arise and become binding orally or through a course of dealing. For example, a binding contract may arise with respect to a "spot" sale when product is furnished in exchange for consideration, even though no written agreement is executed. In cases not involving a written contract, the contract is typically not binding until delivery occurs. Due to the inherent difficulties in determining when contracts for sales which are not pursuant to a written agreement become binding, the date the product is delivered is presumed to be the date a binding contract is entered into. Thus, in the absence of a written contract, a "transaction" is presumed for purposes of DOE's regulations to occur on the date the product is delivered. To the extent that it can be established that a binding contract existed under the applicable state law prior to the time of delivery with respect to a sale which is not made pursuant to a written contract, this presumption that the binding contract was entered into at the time of delivery can be rebutted.

Thus, for example, if a delivery of product under an oral contract occurred subsequent to May 15, 1973, the contract is presumed to constitute a post-May 15 "transaction" and therefore would not qualify as a base period "transaction" unless this presumption is rebutted. If delivery occurred on May 15, 1973, under the same facts, the contract would constitute a May 15, 1973, "transaction" and would be included in the determination of the May 15, 1973, selling price. Finally, delivery occurring before May 15, 1973, in the absence of a written contract, could constitute a base period "transaction" only if there were no other "transactions" with respect to the product and class of purchaser concerned after the date of delivery and before May 16, 1976. However, as

noted above, if the presumption that the unwritten contract became binding at the time of delivery can be overcome, the results would be modified to turn upon the date established under the applicable state law as the date the contract became binding.

D. WEIGHT AVERAGING

Once a seller determines the appropriate date for each "transaction" in accordance with the foregoing discussion, it is a fairly simple matter to calculate the weighted average price on the base date. For example, if a firm had three "transaction" involving product X with members of a particular class of purchaser on May 15, 1973, and those three "transaction" concerned the sale of 3,000 gallons at 20.5 cents/gallon, 5,000 gallons at 20.7 cents/gallon, and 10,000 gallons at 21.0 cents/gallon, respectively, the weighted average price would be calculated as follows:

$$\begin{aligned} & [(3,000 \times 20.5) + (5,000 \times 20.7) + (10,000 \times 21.0)] / (3,000 + 5,000 + 10,000) = \$615 \\ & + \$1,035 + \$2,100 / 18,000 \text{ gal} = \text{Weighted} \\ & \text{average price} = 20.83 \text{ cents/gallon.} \end{aligned}$$

On the other hand, if the firm had only one "transaction" involving product X with the class of purchaser concerned on May 15, 1973, and that was the first transaction in the example above (3,000 gallons at 20.5 cents/gallon), the "weighted average price" under the regulations would be 20.5 cents/gallon. In such a case, the volume, or number of gallons, would be immaterial.

Of course, if there were no "transactions" with respect to the product and class of purchaser concerned on May 15, 1973, the seller would, pursuant to § 212.83(a)(3) or § 212.93(d), look to the "transaction(s)" on the most recent day preceding May 15, 1973, on which a "transaction" occurred in order to make the necessary weighted average price computations.

IV. EXAMPLES

The application of the "transaction" definition may be demonstrated by the analysis of the hypothetical situations presented below. These hypothetical situations are merely exem-

plary and many variations of such sales undoubtedly exist.

1. In the four examples which follow, Firm X enters into a separate written contract for the sale of gasoline with each of the four purchasers which comprise a particular class of purchaser.

(a) On May 15, 1973, Firm X entered into a written contract with Purchaser A calling for the sale and delivery on June 15, 1973, of 3,000 gallons of gasoline at a price of 20.5 cents per gallon. Pursuant to this contract, Firm X delivered the 3,000 gallons to Purchaser A on June 15, 1973.

There can be no question that a May 15, 1973, "transaction" occurred for the purposes of the price rules. The contract was entered into by both parties on May 15, 1973, and both the quantity of gasoline to be sold and the price were certain as of that date and, thus, are able to be employed in calculating Firm X's maximum allowable price.

(b) On May 15, 1973, Firm X entered into a one-year contract for the sale of gasoline to Purchaser B. The contract called for monthly deliveries of 5,000 gallons. The price for gasoline sold pursuant to the contract was governed by a contractual clause which set the price over the term of the contract by reference to specified published price reports concerning certain prices in effect on the date of delivery. Deliveries pursuant to the May 15, 1973 contract commenced on July 1, 1973.

The requirement of the price rule that the maximum allowable price reflect the weighted average price in transactions with the class of purchaser concerned on May 15, 1973, or earlier makes it necessary that before any "transaction" can be used to calculate the weighted average price, it must reflect market prices current as of May 15, 1973, or earlier. In this case, the price at which the first delivery would be made (on July 1, 1973) was not specified in the contract and the price at which the product ultimately changed hands pursuant to the terms of the contract reflected market conditions as of July 1, 1973, rather than as of May 15, 1973. Therefore, pursuant to the discussion in Section III.B of this ruling, the date on which a price

is fixed for a particular delivery under a variable-price contract is the date on which a "transaction" occurs; and since the first date on which a price was fixed for a delivery in this example did not occur until July 1, 1973, it is not a base period "transaction" and is excluded from Firm X's weighted average price calculations applicable to the product and class of purchaser concerned.

(c) On May 15, 1973 Firm X entered into a contract for the sale of gasoline to Purchaser C over a one-year period beginning with July 1973. The price of the gasoline was fixed by the contract at 21.0 cents per gallon, with the amount of gasoline to be purchased to be determined by the purchaser's needs, subject to certain maximum and minimum limitations. Purchaser C accepted delivery of 10,000 gallons on July 1, 1973.

The contract described in this example specifies a fixed price at which the product will be sold over the term of the contract and constitutes a May 15, 1973, "transaction." In order to determine the volume to be attributed to that price, the quantity of gasoline included in the first delivery on July 1, 1973, is used. Firm X therefore weight-averages the price pursuant to this contract at the July 1 delivery volume with other May 15, 1973, "transactions."

(d) Firm X entered into a one-year contract with Purchaser D under the same terms and conditions specified in Example 1(c), except that the contract was entered into on May 1, 1973. The first delivery under the contract occurred on July 1, 1973, as in Example 1(c).

Entry into a fixed-price contract on May 1, 1973, constitutes a "transaction" on that date. This May 1, 1973, "transaction" is not a base period "transaction," however, because Firm X had "transactions" on May 15, 1973, with Purchasers A and C. Therefore, it is not included in the weighted average price calculations for Firm X with regard to the product and class of purchaser concerned.

Calculation of Weighted Average Price in Example 1:

$$\frac{[(3,000 \times 20.5¢) + (10,000 \times 21.0¢)]}{[3,000 + 10,000]} = (\$615 + \$2,100) / 13,000$$

gal. = Weighted average price = 20.88
cents/gallon.

2. In the three examples which follow, Firm Y enters into a separate written contract for the sale of gasoline with each of the three purchasers which comprise a particular class of purchaser.

(a) Pursuant to a one-year contract entered into on April 1, 1973, that called for deliveries of gasoline in 3,000 gallon amounts over the period of the contract at a fixed price of 15.2 cents per gallon, Firm Y delivered 3,000 gallons of gasoline to Purchaser A on May 15, 1973.

This delivery of gasoline on May 15, 1973, pursuant to a previously executed fixed-price contract in this example does not constitute a "transaction." Rather, the "transaction" in this example occurred with the entry into the fixed-price contract on April 1, 1973.

(b) On May 15, 1973, Firm Y delivered 10,000 gallons of gasoline at 16 cents per gallon to Purchase B. The delivery was made pursuant to a one-year contract entered into on April 1, 1973, which called for the sale of 10,000 gallons of gasoline each month during the one-year period at prices to be determined by reference to specified published price reports concerning certain prices in effect on the date of delivery. A previous delivery had been made to Purchaser B on April 10 under this contract at a price of 15.5 cents per gallon.

In this example the contract entered into on April 1, 1973, was a variable-price contract and a "transaction" did not, therefore, occur on that date. Rather, the May 15, 1973, fixing of a price for a particular delivery constituted a fixed-price subsidiary contract pursuant to the long-term variable-price general contract and is therefore the date on which a "transaction" occurred. This "transaction" more accurately reflects market prices on May 15, 1973, than would the price in any other delivery pursuant to the variable-price contract, such as the April 10, 1973, delivery price.

(c) On January 1, 1973, Firm Y entered into a one-year contract for sale

of gasoline to Purchaser C at 15.0 cents a gallon in amounts to be determined by the buyer subject to certain maximum and minimum limitations. Firm Y delivered 6,000 gallons of gasoline to Purchaser C under this contract on January 15, 1973, and 5,000 gallons of gasoline to Purchaser C on May 15, 1973.

The "transaction" in this example occurs on January 1, 1973, when the fixed-price contract was entered into. The amount of gasoline supplied on January 15, 1973, supplies the volume data attributable to that price for purposes of computing a weighted average price. However, since a more recent "transaction" of Firm Y (before May 16, 1973) occurred with Purchase B (on May 15, 1973), Firm Y excludes the "transaction" with Purchaser C which occurred on January 1, 1973, in computing its weighted average price. For the same reason, Firm Y must also exclude, of course, the April 1, 1973, "transaction" with Purchaser A. Therefore, Firm Y's "weighted average price" in this case is the price in the single May 15, 1973, "transaction" with Purchaser B—i.e., 16.0 cents/gallon.

V. EXCEPTION REQUESTS

DOE is aware that there have been a variety of interpretations concerning the application of the "transaction" definition to variable-price contracts. Although DOE believes the interpretation set forth in this ruling most accurately reflects the purposes and objectives of the "transaction" definition and related price regulations, in light of all the considerations set forth in detail in Sections II-IV of this ruling, firms which have adopted differing interpretations of the term may suffer gross inequity or severe hardship. Accordingly, DOE will receive and process requests for exception from the application of the transaction definition as set forth herein and in connection with any such requests will consider whether the usual presumption against retroactive relief should be applied.

[42 FR 15302, Mar. 21, 1977]

RULING 1977-6—APPLICABILITY OF THE STRIPPER WELL PROPERTY EXEMPTION TO PROPERTIES THAT PRODUCE BOTH CRUDE OIL AND CONDENSATE RECOVERED IN NON-ASSOCIATED PRODUCTION

Facts: Property A consists of five wells. Three of the wells on Property A each produced crude oil and condensate during the preceding 12 months. One well on property A produced condensate in non-associated production (condensate only and no crude oil) during the preceding 12 months. One well on property A produced only natural gas with no crude oil or condensate. All wells on the property have been maintained at the maximum feasible rate of production and in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production.

Issues: A. For purposes of the stripper well property exemption, how does the producer compute the average daily production of property A for the preceding 12 months?

B. How does the producer determine the maximum price permitted under DOE price regulations for the crude oil and condensates produced and sold from property A?

Ruling: The stripper well property exemption is contained in 10 CFR 212.54 (a) which provides,

(a) Prices charged in the first sale of crude oil (*excluding condensate recovered in non-associated production*), produced and sold from any stripper well property are exempt from the provisions of this part. (Emphasis added.)

In § 212.54(c), a "stripper well property" is defined as

A "property" whose average daily production of crude oil (*excluding condensate recovered in non-associated production*) per well did not exceed 10 barrels per day during any preceding consecutive 12-month period beginning after December 31, 1972. (Emphasis added.)

"Average daily production" is defined in turn as the qualified maximum total production of crude oil (*excluding condensate recovered in non-associated production*) produced from a property, divided by a number equal to the number of days in the 12-month qualifying period times the number of wells that produced crude oil (*excluding condensate recovered in non-associated production*) from that property in that 12-month period. To qualify as maximum total production, each well on the property

must have been maintained at the maximum feasible rate of production throughout the 12-month qualifying period and in accordance with recognized conservation practices, and not significantly curtailed by reason of mechanical failure or other disruption in production. (Emphasis added.)

Written mathematically, "average daily production" may be expressed as follows:

$$A = Q / (D \times W)$$

where:

A = Average daily production of crude oil excluding condensate recovered in non-associated production.

Q = Qualified maximum total production of crude oil, excluding condensate recovered in non-associated production, produced from the property during the measuring 12-month period.

D = Number of days in the measuring 12-month period. (Always either 365 or 366.)

W = Number of wells that produced crude oil, excluding condensate recovered in non-associated production, from the property during the measuring 12-month period.

Accordingly, in calculating a property's average daily production to determine whether the property has qualified as a stripper well property, a producer may not include wells that did not produce crude oil during the measuring 12-month period, i.e., wells that produced only condensate in non-associated production or wells that produced only natural gas. (See DOE Ruling 1974-28, 39 FR 44414, December 24, 1974. See also 40 FR 40818, September 4, 1975.) In DOE Ruling 1977-2 (42 FR 4409, January 25, 1977) DOE addressed the distinction between "associated" and "non-associated" production for purposes of the stripper well property exemption, setting forth objective criteria to be used in determining if a particular well (regardless of its classification by any other governmental authority) produces crude oil.

To the extent that a property was comprised during the measuring 12-month period both of wells that produced crude oil and wells that produced only natural gas or that produced only condensate in non-associated production, the first step is to determine the average daily production

of only the wells that produced crude oil. That is to say, the qualified maximum total production of only the wells that produced crude oil should be divided only by a number equal to the number of wells that produced crude oil times the number of days in the measuring 12-month period. If such calculation results in an average daily production of more than 10 barrels per well per day, the property has not qualified as a stripper well property, and production from the entire property is subject to the ceiling price limitations of Subpart D, without regard to whether the production is from wells that produce crude oil or wells that produce only condensate in non-associated production.

If, on the other hand, such calculation results in an average daily production of 10 barrels or less per well per day, the property has qualified as a stripper well property. However, pursuant to § 212.54 (a), prices charged only in the first sale of crude oil, excluding condensate recovered in non-associated production, produced and sold from a stripper well property are exempt from the provisions of Part 212. Therefore, prices charged in the first sale of crude oil and condensate produced only from the wells that currently produce crude oil are exempt. Condensate produced from any well on the property which does not in any month produce crude oil (i.e., condensate recovered in non-associated production), however, is subject to the ceiling price limitations of Subpart D. Therefore, condensate recovered in non-associated production from these wells must be sold pursuant to the lower tier ceiling price rule unless such volumes qualify as new crude oil.

Whether such condensate recovered in non-associated production is properly characterized as new crude oil must be determined with reference to the base production control level for the entire property. However, if crude oil

produced and sold from the property is exempt as stripper well crude oil, a recalculation of the BPCL must be done to exclude volumes of crude oil and associated condensate produced and sold from the property's oil wells. If, and only if, current monthly production of non-associated condensate exceeds the property's recalculated BPCL, such condensate may be characterized as "new crude oil." Otherwise, such condensate recovered currently in non-associated production must be sold as "old crude oil" subject to the lower tier ceiling price rule.

DOE recognizes that producers have not in all instances provided sophisticated techniques for the separate measurement of associated and non-associated condensate produced from the same property. Accordingly, it may be necessary—where production of crude oil and associated condensate is commingled with production of non-associated condensate into a common facility—to estimate current or historic production volumes in order to determine which volumes should be included for purposes of the calculations discussed in this Ruling. In this regard, DOE will recognize reasonable estimates made by a producer where such estimates are based upon generally accepted production accounting methods.

[42 FR 23501, May 9, 1977]

RULING 1977-7—POST-SEPTEMBER 1, 1976 TREATMENT OF SEPARATE RESERVOIRS AS STRIPPER WELL PROPERTIES

BACKGROUND

Effective September 1, 1976, the Department of Energy ("DOE") amended the definition of "property" in 10 CFR 212.72 so that a producer may, but is not required to, treat as separate properties each separate and distinct producing reservoir subject to a single right to produce crude oil, provided that the reservoir is not in communication with any other reservoir subject to the same right to produce. *And provided*, That the reservoir is recognized as such by the appropriate governmental regulatory authority, and where production has been consistently and historically reported as such.

¹ In accordance with DOE Ruling 1975-12 (40 FR 40828, September 4, 1975), an adjustment to each well will have to be made to the extent that production of crude oil from the well was significantly curtailed or disrupted during the measuring 12-month period.

The amended definition of property was intended to provide more realistic incentives under the two tier price system over the longer term of price controls on domestic crude oil. (See 41 FR 36172, August 26, 1976.) (Prior to September 1, 1976, a producer could treat separate reservoirs as separate properties only where there were "separate and distinct rights to produce crude oil from each reservoir." ("DOE Ruling 1975-15", 40 FR 40832, September 4, 1975.))

Subsequent to issuance of the amended definition of property, DOE received comments addressed to certain issues raised by the amendment (as well as other issues not relevant to this Ruling), which were resolved in "DOE Ruling 1977-2" (42 FR 4409, January 25, 1977). In "Ruling 1977-2" DOE determined that, with respect to a particular "right to produce crude oil", once a producer has exercised the option to treat each governmentally-recognized separate reservoir as a separate property a reservoir-property created by the exercise of that option may not qualify as a stripper well property until it has sustained production levels of 10 barrels or less per well per day for a consecutive 12-month period, "commencing after the reservoir has been designated as a separate property". DOE also determined in "Ruling 1977-2" that, subject to certain exceptions not relevant in the context of this Ruling, once a producer has elected to designate a single right to produce crude oil as two or more separate reservoir-properties, the producer may not redesignate any two or more of those separate reservoirs as a single property.

This Ruling is addressed only to those cases in which, subsequent to September 1, 1976, but prior to February 1, 1977, producers elected to designate single properties as two or more separate reservoir-properties and mistakenly began to treat one or more of the separate reservoirs as stripper well properties before such time as the reservoir-properties had established production rates of 10 barrels or less per well per day for a consecutive 12-month period commencing after the election to treat such reservoirs as separate properties.

DISCUSSION

Since the issuance of "Ruling 1977-2," DOE has learned that, with respect to certain properties, some producers elected to designate a single right to produce crude oil as two or more separate reservoir-properties under the mistaken assumption that the September 1 amendment to the definition of property permitted immediate classification of one or more of those separate reservoirs as stripper well properties. While some of these producers desire to continue to treat such reservoirs as separate properties because of the additional incentives that arise under the September 1, 1976 amendment to the definition of property, other producers may not wish to continue such separate property treatment, because by treating the right to produce crude oil encompassing several reservoirs as a single property, these latter producers would be permitted to produce and sell greater quantities of new crude oil.

However, because of the restrictions contained in "Ruling 1977-2" which generally prohibit the redesignation of any two or more separate reservoirs as a single DOE property, and due to the general two month prohibition in 10 CFR 212.72 against the certification of volumes of crude oil as new crude oil, some producers in both categories may now be in a less advantageous position than would otherwise have been permitted under the price regulations. Accordingly, DOE will permit, to the extent possible as more fully discussed below, such producers to be placed in the same position that would have been permitted under the price regulations had they not erroneously treated such separate reservoirs as stripper well properties. In no instance, however, will a producer be permitted to retain revenues obtained as a result of improper treatment of such a reservoir as a stripper well property.

DOE is aware of the following situations in which a producer might have been placed in a disadvantageous position under the price regulations because of his mistaken assumption that the September 1, 1976 amendment to the definition of property permitted the immediate treatment of separate

reservoirs as stripper well properties. It is to these situations only that this Ruling is addressed.

EXAMPLE I

Facts. Producer X elected to treat a single property as three separate properties effective October 1, 1976, based upon the recognition by the appropriate governmental regulatory authority of three separate reservoirs underlying the property. However, Producer X's decision to treat the separate reservoirs as separate properties was based solely upon the mistaken assumption that Reservoir A could be classified as a stripper well property effective October 1, 1976. Producer X would not otherwise have elected to treat the single property as three separate properties, because to do so would have resulted in lower volumes of new crude oil produced and sold from the three reservoir properties than would have been produced and sold had Producer X continued to treat the three reservoirs as a single DOE property. For the months of October 1976 through January 1977, Producer X certified all the crude oil produced and sold from Reservoir A as stripper well crude oil and charged prices in excess of the upper tier ceiling price.

With the issuance of "Ruling 1977-2," Producer X learned that the certification of crude oil as stripper well crude oil from Reservoir A is improper until such time as the reservoir has sustained an average daily rate of production of 10 barrels or less per well per day for a consecutive 12-month period commencing on or after October 1, 1976.

Issues. (1) Must Producer X refund any revenues obtained as a result of having certified the production and sale of crude oil from Reservoir A as crude oil produced and sold from a stripper well property?

(2) Notwithstanding the provisions of "Ruling 1977-2," may Producer X redesignate the separate reservoirs back as the single property that existed prior to October 1, 1976?

(3) Notwithstanding the provisions of 10 CFR 212.72, may Producer X recertify as "new crude oil" those volumes of crude oil that would have been produced and sold from the

entire property during the period October 1, 1976, through January 31, 1977, but which were not certified as new crude oil because such volumes were mistakenly certified as stripper well crude oil?

Ruling. (1) Yes. DOE made it clear in "Ruling 1977-2" that a reservoir-property may not qualify as a stripper well property until it has sustained a production rate of 10 barrels or less per well per day for a consecutive 12-month period commencing *after* the reservoir has been designated as a separate property. As DOE indicated in the October 29, 1976, Notice adopting the stripper well property exemption, this is consistent with the Congressional intent "to *prolong* the production of crude oil from properties that produced 10 barrels per well per day or less, and not to generate development of new stripper well properties." (Emphasis added, 41 FR at 48321.)

Accordingly, any revenues obtained by Producer X as a result of erroneously characterizing Reservoir A as a stripper well property, were in excess of the ceiling prices determined under Subpart D, and must be refunded.

(2) Yes. "Ruling 1977-2" does provide that:

[O]nce a producer has elected to treat separate reservoirs subject to a single right to produce as separate properties, such a decision shall be effective from that time forward with respect to all of the separate and distinct producing reservoirs subject to the same right to produce . . .

Moreover, the decision to segregate all of the producing reservoirs subject to the same right to produce, is one that, once made for a particular property, is not subject to modification throughout the duration of price controls applicable to the first sale of domestic crude oil.

However, DOE recognizes that, with respect to certain properties, some producers elected during the period from September 1, 1976, through January 31, 1977, to segregate reservoirs subject to the same right to produce in reliance upon the mistaken belief that the provisions of the September 1, 1976, amendment to the definition of property permitted the immediate

treatment of such reservoirs as stripper well properties. DOE also recognizes that in many cases such elections would not have been exercised had the producer known that none of such reservoirs could qualify as a stripper well property until at least 12 consecutive months had elapsed. Under these circumstances, DOE has determined that to apply the redesignation proscription of "Ruling 1977-2" so as to prohibit producers from redesignating such reservoirs as the single property that existed prior to the exercise of the option to segregate separate reservoirs would constitute a gross inequity and may in many cases result in serious hardship.

Accordingly, where a producer, during the period September 1, 1976, through January 31, 1977, elected to treat separate reservoirs subject to a single right to produce crude oil as separate properties based solely upon the assumption that one or more of such reservoirs was entitled to immediate treatment as a stripper well property, the producer may promptly redesignate such separate reservoirs as the single property that existed prior to the election to segregate.

(3) Yes. § 212.72 provides that new crude oil volumes shall not include:

any number of barrels not certified as new crude oil pursuant to the provisions of § 212.131(a)(2) within consecutive two-month period immediately succeeding the month in which the crude oil is produced and sold, except where such recertification is *explicitly* required or *permitted* by DOE order, interpretation or *ruling*. (Emphasis added.) With respect to Producer X, the failure to certify what would otherwise have properly qualified as new crude oil volumes produced and sold from the entire property is the result only of Producer X's having mistakenly treated those volumes as stripper well crude oil, and certified them as such, based upon his mistaken assumption that exempt treatment was immediately permitted under the September 1, 1976, amendment to the definition of property. Under these circumstances, DOE has concluded that it is permissible for Producer X to compute, for the months of October 1976 through January 1977, the vol-

umes of new crude oil that would have been produced and sold each month had the producer continued to treat the particular right to produce crude oil as the single property that existed prior to October 1, 1976. Producer X may now certify such volumes, for the months October 1976 through January 1977, as new crude oil. The net result is that, for any such volumes that had been certified as stripper well crude oil, Producer X is required to refund to the purchaser only the difference between the exempt price paid for those barrels of crude oil and the upper tier ceiling price applicable to those barrels of crude oil in those months, without the payment of any penalty on that difference. If during that period Producer X had certified as stripper well crude oil a greater number of barrels than would have qualified as new crude oil, Producer X is required to refund to the purchaser the difference between the exempt price paid for those barrels of crude oil and the lower tier ceiling price applicable to those barrels of crude oil for the months October 1976 through January 1977, without the payment of any penalty on that difference.

DOE has also determined that such recertification may be necessary and will be permitted by DOE in the manner described above, where a producer wishes to continue separate property treatment for each individual reservoir based upon the additional benefits that accrue under the two tier price system. In other words, for some properties a producer may not wish to redesignate the separate reservoirs as the single property that existed before the election to segregate separate reservoirs, because the aggregate volumes of new crude oil produced and sold would be greater if each separate reservoir underlying the property were treated as a separate property than if the entire right to produce crude oil were treated as a single property. However, such a producer may have failed to certify some of those crude oil volumes as new crude oil during the period September 1, 1976 through January 31, 1977, because they were mistakenly certified as stripper well crude oil. In this situation DOE will also permit any volumes that would other-

wise have qualified as new crude oil during that period to be recertified as new crude oil produced and sold from the separate reservoir during that period. For any crude oil volumes mistakenly certified during that period as stripper well crude oil, refunds will be required, subject to the offset provisions discussed above.

EXAMPLE II

Facts. Producer Y elected to treat a single property as three separate properties effective October 1, 1976, either because to do so afforded additional incentives under the two tier price system or because the election was based upon Producer Y's mistaken belief that one or more of the resulting reservoir properties was entitled immediately to treatment as a stripper well property. In reliance upon the mistaken belief that Reservoir A was qualified immediately as a stripper well property, and that Producer Y was entitled to charge exempt prices for crude oil produced and sold from Reservoir A, Producer Y invested additional funds designed to increase production from that reservoir.

Issue. May Producer Y continue to treat Reservoir A as a stripper well property?

Ruling. No. As indicated above, a reservoir-property may not qualify as a stripper well property until such time as it has sustained levels of production of 10 barrels or less per well per day for a consecutive 12-month period commencing after the election to treat the reservoir as a single property. Accordingly, DOE will not, as a general matter, permit the treatment of such reservoirs as stripper well properties. However, as in Example I above, Producer Y may now certify as new crude oil any volumes produced and sold during the period October 1, 1976, through January 31, 1977, which would have qualified as new crude oil but which were mistakenly certified during that period as stripper well crude oil. Also, as in Example I above, any exempt prices received for such volumes must be refunded, without penalty, to the purchasers of such crude oil.

To the extent that producers, in reliance upon the mistaken belief that

one or more reservoir-properties could qualify immediately as a stripper well property undertook additional investments for the implementation of projects designed to increase production from any such reservoir, and where such investments were based upon the mistaken assumption that crude oil produced and sold from such a reservoir could be sold at prices above the upper tier ceiling price, and where producers have invested additional funds which cannot adequately be recovered, even by the recertification permitted by this Ruling, DOE will consider relief, on a case-by-case basis through the DOE Office of Exceptions and Appeals, on grounds of gross inequity or serious hardship.

REINSTITUTION OF SUPPLIER/ PURCHASER RELATIONSHIPS

In situations similar to one of the examples above, a producer may have erroneously certified production from one or more reservoir-properties as stripper well crude oil and, on that basis, terminated a supplier/purchaser relationship with the original purchaser under 10 CFR 211.63(d)(1) (ii) or (iii). Such a termination would be improper if based solely on what the producer believed to be the status of the reservoir as a stripper well property. Accordingly, unless the termination was otherwise permitted by the provisions of § 211.63(d), the obligation imposed on the supplier by its supplier/purchaser relationship under § 211.63 would require prompt resumption of the supply relationship with the original purchaser.

[42 FR 35161, July 8, 1977]

RULING 1977-8—TERMINATION OF CRUDE OIL SUPPLIER/PURCHASER RELATIONSHIPS BY A PRODUCER

I. INTRODUCTION

On September 30, 1977, the Federal Energy Administration (FEA), a predecessor agency to the Department of Energy (DOE), amended the crude oil supplier/purchaser rule (the rule) of the Mandatory Petroleum Allocation Regulations, as set forth in 10 CFR 211.63, to permit a crude oil producer to unilaterally terminate its crude oil supplier/purchaser relationship with a reseller, subject to certain conditions. 42 FR

54261 (October 5, 1977). The amendments, which became effective on December 1, 1977, generally permit a crude oil producer to terminate its crude oil supplier/purchaser relationship with a reseller, and to substitute a new reseller, provided that the new reseller offers to continue to supply the crude oil involved to the refiners which had been purchasing that crude oil from the existing reseller. As will be discussed in more detail below, the amendments are intended to foster competition in the crude oil reseller industry while providing adequate protection to refiners' domestic crude oil supplies.

Refiners purchase crude oil from crude oil producers for a number of reasons: (1) For direct use as a refinery feedstock; (2) for exchange (through direct exchanges, matching purchase and sale agreements, time trades, etc.) to obtain suitable crude oil for refinery feedstock; (3) for use in accommodation sales; and (4) to resell for profit.

In light of the fact that no definition of the term "reseller" appears in 10 CFR Part 211, it is necessary to clarify which of these activities of a refiner will be deemed to be "reseller" transactions for purposes of permitting the termination of a supplier/purchaser relationship pursuant to 10 CFR 211.63(d)(1)(iv).

Purchases of crude oil by a refiner from a producer for direct use as refinery feedstock clearly do not involve resales of that crude oil. Likewise, crude oil exchange agreements do not constitute resales, because in each such arrangement the refiner receives an equivalent volume of crude oil (subject to customary quality and location differentials) for use as refinery feedstocks.¹ On the other hand, resales of crude oil by a refiner for profit, often accomplished through a trading subsidiary, are obviously reseller activities to which the termination provisions of 10 CFR 211.63(d)(1)(iv) apply. Less clear, however, is the treatment to be accorded crude oil accommodation sales by refiners, and whether a refiner may be deemed to be a reseller for purposes of terminating crude oil supplier/purchaser relationships. Therefore, this Ruling is intended to interpret the meaning of the term "reseller" in the context of the crude oil supplier/purchaser rule.

II. EVOLUTION AND PURPOSES OF THE RESELLER TERMINATION PROVISION

The crude oil supplier/purchaser rule was adopted by the Federal Energy Office (FEO), in January 1974, to maintain intact

the national crude oil distribution system as it existed on December 1, 1973, and thereby to assure refiners, particularly small and independent refiners, continued access to domestic crude oil supplies. 39 FR 1974 (January 15, 1974). The FEA (and now the DOE) was concerned, however, with the possible anticompetitive effects of freezing domestic crude oil supplier/purchaser relationships between producers and resellers. Accordingly, the rule was amended on three occasions to provide increasing amounts of flexibility in those relationships.

In November 1975, 10 CFR 211.63(d) was promulgated to permit a producer to substitute a new reseller for its previous reseller, provided that the refiners receiving the producer's crude oil consented to the substitution. 40 FR 5422 (November 24, 1975). In June 1976, § 211.63(d) was amended to permit a producer to terminate the supplier/purchaser relationship with its reseller without the consent of the refiners processing the producer's crude oil, so long as the new reseller offered to continue to supply the crude oil to the same refiners with no increase in handling and transportation charges. 41 FR 24338 (June 16, 1976). The latest amendment permits a producer to terminate its supplier/purchaser relationship with a reseller without the consent of the refiners, provided that the new reseller offers the refiners a right of first refusal to continue to purchase the crude oil. Where the refiner is a small refiner, however, it must consent to the substitution for the termination to be effective.

When § 211.63(d) was first proposed in April 1975, the DOE emphasized that it was attempting to devise a rule that would:

... promote efficiency in the transportation and marketing of crude oil by providing greater flexibility for producers and refiners to arrange for transportation and other services normally performed by resellers of crude oil on the most favorable terms available. 40 FR 18182 (April 25, 1975).

Each successive amendment to the rule has provided measures carefully designed to foster competition without endangering refiners' continued access to crude oil supplies to refiners in the preamble promulgating the rule currently in effect:

The DOE believes that the reseller substitution method set forth ... today is reasonably well adapted to accomplishing the goal of permitting greater flexibility on the part of producers to select the resellers with which they do business, while at the same time avoiding undue disruption in the crude oil supply system and protecting the crude oil supply of refiners. ... (B) By providing all refiners the right of first refusal as to their volumes of crude oil, the amendments provide a means for all refiners to assure

¹In the Preamble to the amendments to the price regulations applicable to resales of crude oil, effective January 1, 1978, exchanges are not treated as resales. 42 FR 64856 (December 29, 1977).

continuation of their supplies of domestic crude oil. 42 FR 54261 (October 5, 1977).

The thrust of the successive amendments to the crude oil supplier/purchaser rule is unmistakable. It is to increase competition in the crude oil distribution system while preserving stable sources of domestic crude oil supplies to refiners for refinery operations.

III. RESELLERS

The DOE has described the functions of crude oil resellers as follows:

Resellers generally purchase crude oil from producers (and occasionally from other resellers) and transport such crude oil by truck and/or pipeline to a delivery point where the crude oil is sold, generally to refiners for processing. Producers of small volumes of crude oil and producers of crude oil at locations which are inconveniently located with respect to delivery points often are unable to obtain direct access to major pipelines because of the volume or location of the crude oil they produce * * *. (C) crude oil resellers began to enter the marketplace in the late 1940's and early 1950's in response to the need of such producers to move small and/or inconveniently located volumes of crude oil to the major pipelines * * *. The purchase and resale of crude oil by such firms appears to be an important historical element in the crude oil distribution chain. 41 FR 47077 (October 27, 1976).

Resellers' profits are based upon the increased prices they charge to refiners (or subsequent resellers) for the crude oil they purchase from producers. This price, of course, is subject to the restraints imposed by the price rule of the Mandatory Petroleum Price Regulations.

The term "reseller" is not presently defined in the Mandatory Petroleum Allocation Regulations. However, a definition did appear in the allocation regulations initially adopted by the FEO, which defined a reseller as "any person, firm, corporation or sub-division thereof that carries on the trade or business of purchasing any allocated substance and reselling it without substantially changing its form." 39 FR 1924 (January 15, 1974). This definition was deleted on May 1, 1974, as part of amendments which introduced the definitions of "wholesale purchaser-reseller" and "wholesale purchaser-consumer." 39 FR 15960 (May 8, 1974). Through an apparent oversight, when 10 CFR 211.63(d) was added in November 1975, a definition of reseller was not reinserted into the regulations.

IV. REFINERS

Refiners are firms which own facilities for "processing crude oil feedstock and manufacturing refined petroleum products * * *." (10 CFR 211.51). In some cases, however, re-

finers may nonetheless perform some of the functions traditionally associated with resellers of crude oil. Often refiners, particularly major, integrated refiners, will purchase crude oil directly from producers for use in their refineries. While most of this crude oil is destined to become part of that refiner's crude oil feedstocks, either directly or by exchange, in some cases a portion of the crude oil is sold by the refiner.²

Since a refiner may act in a reseller capacity (most obviously in the case of a refiner which owns a crude oil reseller entity), it is necessary, in light of the purposes underlying the promulgation of the September 30, 1977, amendments to § 211.63, to determine if accommodation sales of crude oil by refiners constitute sales in which the refiner is acting in the capacity of a "reseller."

Accommodation sales, which divest a refiner of excess volumes of crude oil (as in the case of inventory adjustments) or which accommodate other refiners in return for past or future accommodations, are a necessary and integral part of the refining industry's crude oil supply arrangements. Such sales serve important purposes. For instance, refiners often must blend their crude oil feedstock before processing. Refiners carefully tailor their crude oil feedstocks, taking into account such considerations as the gravity and sulfur content of the crude oils to be processed. The feedstock blend may have a vital effect on the ability of the refiner to maximize production from the refinery and to achieve the optimal production of a product slate, which may change to reflect varying market conditions and seasonal demands. Accommodation sales of crude oil may also be necessary as a result of refinery shutdowns, refinery maintenance operations, or natural disasters which alter the refiners' projections for crude oil consumption. In short, the purpose of accommodation sales is to enable a refiner to obtain the proper crude oil quantity and mix to operate its refinery.

Although traditionally in the domestic refining industry accommodation sales do not give rise to a formal contractual right to receive equivalent volumes of crude oil in return (as in the case of an exchange), such sales are made with the expectation of future "balancing" accommodation purchases.

Thus, accommodation agreements, incidental to refinery operations, serve to further the goal expressed in the Emergency Petro-

²The concept of a firm acting in dual capacities is explicitly recognized in the allocation regulations. For example, pursuant to 10 CFR 211.9(e), a supplier (which may include a refiner), may also act in the capacity of a wholesale purchaser-reseller.

leum Allocation Act of 1973 (EPAA) Pub. L. No. 93-159, where Congress declared that the Mandatory Petroleum Allocation and Price Regulations should provide for "the allocation of suitable types, grade, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity" (EPAA, section 4(b)(1)(E)).

It should be emphasized that a significant aspect of accommodation sales is that they are typically made at a price reflecting the refiner's acquisition cost, plus transportation charges. In this regard, refiner's accommodation sales differ fundamentally from the sales made by resellers, in that no resale profit is involved.

V. MEANING OF THE TERM "RESELLER" IN THE CONTEXT OF THE CRUDE OIL SUPPLIER/PURCHASER RULE

In considering the most recent amendments to the crude oil supplier/purchaser rule, the DOE specifically sought comments on whether the rule should permit a producer to terminate its supplier/purchaser relationship with any "firm," rather than with a "reseller." The effect of such a provision would be to permit the displacement of refiners, as well as resellers, in existing supplier/purchaser relationships. (42 FR 39395, August 4, 1977.) After reviewing the comments submitted in response to this proposal, the DOE concluded that such an extension of 10 CFR 211.63(d)(1)(iv) was inappropriate at the time, and declined to adopt such a rule. In the preamble to the current amendments, the DOE explained its decision as follows:

... several commenters suggested that the substitution rule should be applicable to any supplier/purchaser relationship between a crude oil producer and any 'firm.' This language would have permitted a substitution not only among resellers, but also between resellers and refiners. Thus, it would have permitted a reseller to be inserted between a producer and a refiner that had a direct supplier/purchaser relationship, as well as permitting a refiner to 'eliminate' a reseller. However, several refiners expressed the concern that allowing a reseller to be inserted (against the refiner's wishes) would be likely to result in higher costs, by introducing a middleman's margin where none previously existed. Of course, whether increased costs would in fact result would be partly dependent upon the relative efficiencies of the refiner and the reseller in the performance of the same functions; but the possibility of increased costs occurring simply as a result of the introduction of a third party must be recognized and addressed.

DOE continues to be of the view that it would generally be desirable to further open up the crude oil distribution chain to com-

petition, and thus to provide further flexibility in supplier/purchaser relationships in this chain, to the extent that this can be done consistent with the need to protect crude oil supplies to refiners and in a manner that does not result in unjustified increases in crude oil prices. Therefore, the DOE will attempt to formulate specific criteria and necessary safeguards under which such substitutions might be permitted * * *.

When the preliminary formulation of such criteria is accomplished, the DOE anticipates that it will issue a notice of proposed rulemaking requesting comments upon whether it would be feasible to permit certain additional substitutions under certain specified conditions. (42 FR 54261, October 5, 1977).

DOE's concern over inserting a reseller into the crude oil distribution system was clearly aimed at preventing a reseller from becoming an additional layer in the relationship between producers and refiners. That is, where a refiner is purchasing crude oil directly from a producer, the DOE was fearful that the insertion of a reseller (who would then be required, pursuant to 10 CFR 211.63(d)(iv)(B)(2)(c), to offer to sell that same crude oil to the refiner) would unnecessarily increase the cost of the crude oil the refiner would ultimately receive.

Since refiners utilize exchanges and accommodation sales of their crude oil purchased from producers as a means to obtain suitable crude oil for use in their refineries, the insertion of a reseller into the producer-refiner relationship may in such cases increase the cost of that crude oil to the refiner.

On the other hand, in those cases when, for example, a refiner owns a crude oil trading subsidiary which purchases crude oil from producers for sale at a profit, such activity is not incidental to refinery operations and is identical to that performed by independent crude oil resellers. Where a refiner is reselling crude oil in this manner, the underlying purposes expressed in the preamble to the September 30, 1977, amendments require that such transactions not be shielded from competition from independent crude oil resellers.

VI. CONCLUSION

There is a fundamental difference between the sale of crude oil for profit by resellers and accommodation sales of crude oil utilized of necessity by refiners for the efficient operation of their refineries. In promulgating the September 30, 1977, amendments to §211.63(d), the DOE did not intend to broaden the regulatory concept of "reseller" to include refiners who engage in these accommodation sales. As indicated above, a refiner's accommodation sales, made on an acquisition cost basis, are incl-

dental to the operation of its refineries and, although not constituting an exchange of crude oil, are made in the expectation that such sales will be balanced through accommodation purchases at a later date. Accordingly, § 211.63(d)(1)(iv) does not permit a producer to terminate its supplier/purchaser relationship with a refiner who engages in an accommodation sale of crude oil purchased from a producer.

VII. ADDITIONAL MATTERS

As indicated in the preamble to the September 30, 1977, amendments to the crude oil supplier/purchaser rule, the DOE is continuing to study means to increase competition in the crude oil distribution chain, and is considering issuing a notice of proposed rulemaking that would extend the termination provisions of 10 CFR 211.63(d)(1)(iv) to refiners generally, including their accommodation sales, subject to safeguards that will prevent unnecessary increases in the cost of marketing domestic crude oil. The DOE would welcome comments (as provided by 10 CFR 205.153), as to the effect of this ruling on competition in the crude oil marketing industry, and will consider such comments in any future notice of proposed rulemaking on terminations of supplier/purchaser relationships.

[43 FR 1292, Jan. 9, 1978]

RULING 1979-1—MODIFICATION OF RULING 1977-5: APPLICATION OF THE DEFINITION OF "TRANSACTION" TO VARIABLE-PRICE CONTRACTS FOR PURPOSES OF COMPUTING LAWFUL WEIGHTED AVERAGE MAY 15, 1973 PRICES

I. INTRODUCTION

On March 15, 1977, the Federal Energy Administration, ("FEA") a predecessor agency of the Department of Energy ("DOE"), issued Ruling 1977-5, 42 FR 15302 (March 21, 1977), which interpreted the term "transaction" as it is used in the Mandatory Petroleum Price Regulations applicable to refiners (Subpart E), resellers and retailers (Subpart F), and natural gas processors (Subpart K). The Ruling addressed the application of the definition of transaction to sales of covered products made pursuant to written fixed-price contracts, written variable-price contracts, or no written contract.

The Office of General Counsel of the Department of Energy (DOE) has reexamined Ruling 1977-5 with respect to the treatment of written variable-price contracts under the DOE

price regulations. It has determined that the portion of Ruling 1977-5 applying the definition of transaction to such contracts is erroneous. Accordingly, this Ruling rescinds the portion of Ruling 1977-5 which addresses the treatment of variable-price contracts and clarifies the proper treatment of variable-price contracts under the price regulations. This action does not affect any of the other conclusions reached in Ruling 1977-5, or any formal Interpretations issued by FEA or DOE that are consistent with those conclusions.

As more fully explained below, with respect to sales of covered products made pursuant to a written variable-price contract, DOE is of the view that a transaction must be deemed to have occurred for purposes of the price regulations on the date when a binding contract was entered into between the parties. The transaction price is the price lawfully charged pursuant to the terms of such contract in deliveries occurring on May 15, 1973 or on the most recent day preceding May 15, 1973. If no such deliveries occurred, the transaction price is the price that would have been charged under the terms of the contract had a sale occurred on the day the contract was entered into. Sellers that have determined their prices to classes of purchaser in a manner consistent with this interpretation are considered to have complied with this aspect of the Mandatory Petroleum Price Regulations and should continue to determine lawful selling prices in that manner. However, for the period prior to the date on which this Ruling 1979-1 is issued, the DOE will not charge a firm with violations of the price regulations based on that firm's determinations of prices in accordance with the interpretation set forth in Ruling 1977-5.

II. DISCUSSION OF THE REGULATORY LANGUAGE

A. Determining When a Transaction Occurred.

Under the Mandatory Petroleum Price Regulations, sellers of covered products (excluding first sales of crude

oil, to which ceiling price rules may apply) may not charge a price in sales of covered products (as defined in 10 CFR 212.31) to a particular class of purchaser that exceeds the weighted average price at which the product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs and allowable non-product costs.

For example, for refiners, 10 CFR 212.82 and 212.83(a)(1) state:

"Maximum allowable price" means the weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, computed in accordance with the provisions of § 212.83(a), plus increased product costs and increased non-product costs incurred between the month of measurement and the month of May 1973. . . .

A refiner may not charge to any class of purchaser a price for a covered product in excess of the maximum allowable price. . . .

Thus, in order to establish the maximum price that may lawfully be charged for a covered product, the seller must establish a weighted average price for each class of purchaser for transactions occurring on May 15, 1973. Where no transaction occurred on that day with respect to a particular class of purchaser, imputed price rules are used to determine a transaction price for that class of purchaser. For refiners, 10 CFR 212.83(a)(3) states:

"If no transaction occurred with respect to a particular product on May 15, 1973, the most recent day preceding May 15, 1973 when a transaction occurred shall be used for purposes of computing the maximum allowable price. . . ."

Therefore, the date on which a transaction occurred is significant under the price regulations because that date determines whether the price charged in that transaction will be used in computing the actual or imputed transaction price for the class of purchaser concerned. So long as a single transaction occurred with respect to a particular class of purchaser on May 15, 1973, transactions with that

class which occurred prior to May 15, 1973 will not be included in the computation of the weighted average price for such class of purchaser. Where no transaction occurred on May 15, 1973, with respect to a particular class of purchaser, transactions that occurred with that class on the most recent day preceding May 15, 1973 will be used. Thus, in determining its maximum lawful selling prices, a seller must first look to its lawful prices in transactions on May 15, 1973, or, if no transaction occurred on that date, to the most recent day preceding May 15, 1973 when a transaction occurred.

The definition of transaction in 10 CFR 212.31 is as follows:

"Transaction" means an arm's-length sale between unrelated persons which are not members of a controlled group (as defined in 26 U.S.C. 1563(a)) and is considered to occur at the time and place when a binding contract is entered into between the parties." (Emphasis added.)

In Ruling 1977-5, FEA stated that written variable-price contracts did not become legally binding for purposes of the transaction definition until a delivery had been made pursuant to the contract. The FEA therefore concluded that no transaction occurred on or before May 15, 1973 under a variable-price contract unless there had been a delivery pursuant to the contract on or before May 15, 1973. We believe that this conclusion cannot be sustained in light of the express language of the transaction definition. We therefore conclude that the interpretation set forth in Ruling 1977-5 must be modified accordingly.

B. DETERMINING A PRICE IN TRANSACTIONS BASED UPON WRITTEN VARIABLE-PRICE CONTRACTS.

The definition in § 212.31 states, "Transaction" means an arm's-length sale. . . . In the case of transactions based upon written fixed-price contracts, a price certain is specified in the contract and is used in every sale under the contract. Determining a transaction price pursuant to variable-price contracts entered into on or before May 15, 1973 poses an interpretative problem, however, because a

variable-price contract does not contain any fixed price, but only a mechanism for establishing prices through time, and because sales made pursuant to a variable-price contract may be made at many different prices.

There are two key elements in the transaction definition which appears in § 212.31—an arm's-length sale and the existence of a binding contract between the parties pursuant to which the sale was made. The latter component of the definition is used for purposes of establishing the transaction date. The arm's-length sale requirement indicates that where possible, the transaction price is the price charged under a variable-price contract in actual sales occurring on May 15, 1973 or on the most recent day preceding May 15, 1973. This result is consistent with the rule as it applies to fixed-price contracts.

The transaction definition and the imputed price rules indicate that the sale occurring on May 15, 1973, or the most recent day preceding that date, must be used to determine the transaction price for a variable-price contract. Such a price would accurately reflect actual market conditions leading up to May 15, 1973 as anticipated by sellers and buyers in binding contracts, and would relate to the use of May 15, 1973 as a base for the entire price control system. Such sales also provide actual volumes to be used, where appropriate, for weight-averaging purposes.

If no sale occurred on or before May 15, 1973, DOE believes that the language of the regulations fixes the transaction price at the price that would have been charged had a sale been made on the day the contract was entered into. In order to determine a price when no contract with any member of the class of purchaser concerned was entered into on May 15, 1973, the imputed price rules provide that "the most recent day preceding May 15, 1973 when a transaction occurred," shall be used for purposes of computing the maximum allowable price and applying the price rules. Accordingly, under the language of the transaction definition, where there was no delivery, and thus no sale, on or before May 15, 1973 under the con-

tract, the date when a binding contract was entered into is to be used to establish the transaction price. Thus, under a variable-price contract, such price should be determined as if a sale occurred on the day the contract was entered into.

III. ENFORCEMENT CONSIDERATIONS

The conclusions reached in this Ruling 1979-1 modify any contrary conclusions reached in Ruling 1977-5 and will apply to the computations of transaction prices for the period from August 19, 1973, forward. Price computations that were made before the issuance of this Ruling 1979-1 in accordance with the interpretation set forth in this Ruling are and shall continue to be in compliance with the requirements of the Mandatory Petroleum Price Regulations.

Prices that conform to the erroneous interpretation set forth in Ruling 1977-5, i.e., where a variable-price contract was entered into on or before May 15, 1973, and where the transaction date and price were determined by the most recent delivery to May 15, 1973 pursuant to such contracts, will be considered as proper in limited circumstances. Principles of equity and administrative fairness (as well as procedural constraints on the imposition of sanctions or penalties for actions that comport with a formal Ruling that is subsequently modified by DOE) dictate that such computations be considered as proper under the Mandatory Petroleum Price Regulations for the period prior to the date this Ruling 1979-1 is issued. Accordingly, we have concluded in consultation with the appropriate DOE enforcement officials that for the period prior to the issuance of this Ruling 1979-1, prices in transactions based on variable-price contracts entered into on or before May 15, 1973 and determined in accordance with the interpretation in Ruling 1977-5 will also not be subject to enforcement action. As of the date this Ruling 1979-1 is issued, however, sellers must determine their transaction prices based on variable-price contracts entered into on or before May 15, 1973 according to the interpretation in this Ruling 1979-1.

[44 FR 24046, Apr. 24, 1979]

RULING 1979-2—REDIRECTION OF MOTOR
GASOLINE

The Department of Energy (DOE) is concerned that refiners and importers¹ are not taking advantage of the authority they currently possess pursuant to 10 CFR 211.14(b) of the Mandatory Petroleum Allocation Regulations to redirect motor gasoline to areas experiencing a significantly greater shortage of that product than other areas. This ruling is intended to clarify the authority with respect to motor gasoline that exists under § 211.14(b) to redirect allocated products.

Section 211.14(b) states:

Refiners and importers are authorized to reduce the monthly allocable supply to purchasers of those allocated products covered under Subparts D, E, F, G, H (except Civil Air Carriers) and I (except utilities) for any region or area by up to five (5) percent and to increase the total quantity of any of these allocated products available in another region or area experiencing shortages significantly greater than are being experienced elsewhere in the nation to meet regional imbalances due to weather variation, seasonal demand, or other circumstances beyond their control. Such action may be accomplished without prior approval from the Administrator, FEO, but must be reported immediately after the adjustment occurs to the National FEO, the appropriate regional FEO, and the State Office of any State within a region or area directly affected by the reduction or increase. Redistribution involving reduction of product volumes greater than (5) percent from any State shall require approval from the Administrator, FEO, prior to any action by any refiner or importer. The adjustment provided for in this section shall not be cumulative. Allocation fractions for a region or area which are reduced by such a reduction or an allocated product shall be returned to prereduction levels as soon as practicable.

¹Section 211.51 defines refiners and importers as follows:

"Refiners" means those firms that own, operate or control the operations of one or more refineries.

"Importer" means any firm (excluding the Department of Defense) that owns at the first place of storage any allocated product or crude oil brought into the United States, but not necessarily the importer of record under a license issued pursuant to Part 213 of this chapter.

Section 211.14(a) defines an "area" as follows:

An area, as used in this section, means a State, a group of States within a region, or any geographical part of a State or State's [sic] within a region.

In other words, an area may be a county or group of counties, an incorporated municipality, a Standard Metropolitan Statistical Area (SMSA),² a State or a group of States, or any combination of the foregoing.

Thus, refiners and importers may reduce the monthly allocable supply³ of motor gasoline for a particular area by up to five percent in order to increase the quantity of motor gasoline available to another area whenever the refiner or importer determines that the area to which the supply is being redirected is suffering a significantly greater shortage of motor gasoline than the area from which the supply is being redirected. Notification of such redirection must be given to DOE and the State(s) affected as soon as the redirection is made. No specific findings are required for such a determination. The refiner or importer concerned may take into account any relevant factor in making such a determination. Such relevant factors may include, but are not limited to, the existence of scarce supplies in the shortage areas to which product will be redirected, as evidenced by reduced operating hours of retail sales outlets for motor gasoline and long lines of motorists waiting to purchase motor gasoline at such outlets, in comparison to

²SMSA's are defined by the Census Bureau of the U.S. Department of Commerce.

³As used in § 211.14(b), allocable supply means a refiner's or importer's total supply obligations of product to firms located in a particular area for the month concerned, other than the supplied amounts in that area referenced in § 211.10(b)(1) (i)-(iv), i.e., the allocable supply to an area is the actual monthly amount of motor gasoline that the refiner is required to supply to all firms in that area which supply is subject to an allocation fraction under Part 211. It should be noted that the term "allocable supply" is used in a slightly different sense in § 211.14(b) than it is defined in §§ 211.51 and 211.10(b)(1).

significantly less scarce supplies in other areas.

When such redirections are made from and to areas within a State, a refiner or importer may rely on the following type of declaration by the Governor of that State as a basis for making intra-State redirections.⁴ Each of the Governors of the 50 States, the Chief Executive Officers of the District of Columbia, Puerto Rico and the territories and possessions of the United States, other than the Panama Canal Zone, may declare "shortage" areas within his jurisdiction for purposes of § 211.14(b). Refiners and importers may rely on such declarations in making intra-State redirections, but may not rely on such declarations for making inter-State redirections.

Once a refiner or importer has determined to redirect product under § 211.14(b), up to five percent of the allocable supply of motor gasoline supplied to firms located in areas not designated as "shortage" areas (other areas) may be redirected to firms they supply that are located in a "shortage" area. In so doing, the refiners and importers must insure that all firms they supply in the area from which product is being redirected, including their own retail sales outlets, share in the reduction in proportion to the supplies of motor gasoline subject to an allocation fraction that the firms would have received pursuant to Part 211 had there been no redirection. Refiners and importers must then make these supplies available on an equitable basis to firms they supply in the "shortage" area. The refiners and importers need not make this redirected supply available to all firms they supply in the "shortage" area; nor need they make this supply available to the firms receiving the redirected supply in proportion to the supplies of motor gasoline to which the firms would otherwise be entitled pursuant to Part 211. However, refiners and importers are not permitted to discrimi-

nate in violation of § 211.14(c)⁵ in making this supply available. For example, suppliers may not favor their own retail sales outlets over retail sales outlets or suppliers of retail sales outlets with whom they compete. In turn, any wholesale purchaser-reseller (as defined in § 211.51) that is sold redirected product by a refiner or importer pursuant to § 211.14(b) must equitably distribute that product to firms supplied by the wholesale purchaser-reseller that are located in the "shortage" area designated by the refiner or importer.

Redirections under § 211.14(b) may be made in the current month. A refiner or importer may not use this section retroactively to reduce the amount of motor gasoline a purchaser was otherwise entitled to receive in previous months under Part 211. The provision regarding cumulative adjustments under § 211.14(b) only prohibits a refiner or importer from reducing the allocable supply of motor gasoline in areas not determined to be "shortage" areas without DOE approval by more than a total of five percent in the current month. This provision does not prevent a refiner or importer from increasing the supply of motor gasoline in a "shortage" area by more than five percent, provided that the supply in any one "other" area not determined to be a "shortage" area is not reduced by more than five percent overall. Section 211.14(b) does not require that a refiner or importer take the same percentage of supply of motor gasoline from all "other" areas, i.e., a refiner or importer may decide not to redirect the supply of motor gasoline from certain "other" areas and may decide to redirect varying percentages (up to the five percent maximum for each area) of the supply of motor gasoline from other areas that have not been determined to be "shortage" areas.

⁴Section 211.14(c) provides that: Shifts made pursuant to paragraph (b) of this section shall be employed solely to effect a better regional distribution of allocated products and shall not discriminate against branded or nonbranded independent marketers, independent refiners, or small refiners.

⁵Throughout this Ruling references to "Governor" include the Chief Executive Officers of the jurisdictions listed in the text and references to "State" include the jurisdictions listed in the text.

[44 FR 40055, July 9, 1979]

RULING 1980-1—APPLICATION OF TEST PROCEDURES TO WATER HEATERS DESIGNED TO UTILIZE KEROSENE FUEL

The Department of Energy (DOE) has recently become aware of some uncertainty concerning the applicability of the DOE's test procedures for water heaters, 10 CFR Part 430, Subpart B. The purpose of this Ruling is to give notice that water heaters designed exclusively to utilize kerosene fuel are not presently covered by these DOE regulations.

Title III, Part B of the Energy Policy and Conservation Act (Pub. L. 94-163) (EPCA) established an energy conservation program for consumer products. As part of this program, § 323 (42 U.S.C. 6293) of the EPCA requires that standard methods of testing be prescribed to determine estimated annual operating cost and at least one other useful measure of energy consumption for certain products, including water heaters.

Test procedures for water heaters were proposed by notice issued April 21, 1977 (42 FR 21576, April 27, 1977); final test procedures for water heaters were prescribed on September 27, 1977 (42 FR 54110, October 4, 1977). The DOE has subsequently amended the test procedures for water heaters by notice issued October 13, 1978 (43 FR 48986, October 19, 1978), in order to specify a new method of determining the measure of efficiency of water heaters, and by notice issued August 30, 1979 (44 FR 52632, September 7, 1979), in order to specify a new measure of capacity, first-hour rating.

The applicability of these test procedures is governed by definitions set forth in 10 CFR 430.2, which provide:

"Gas" means either natural gas or propane.

"Oil" means heating oil grade No. 2 as defined in American Society for Testing and Materials (ASTM) D396-71.

"Water heater" means an automatically controlled thermally insulated vessel designed for heating water and storing heated water, which utilizes either oil, gas, or elec-

tricity as the fuel or energy source for heating the water, which is designed to produce hot water at a temperature of less than 180° F. . . .

The DOE is concerned that its test procedures might be improperly construed to apply to a model of water heater designed for use with kerosene fuel. In prescribing the test procedures for water heaters, the DOE did not include kerosene or kerosene-fueled water heaters in the test program, since "water heater" is expressly defined to include only those units utilizing specified fuels and or energy sources, which do not include kerosene. Kerosene is covered neither by the regulatory definition of "oil" nor by the definition of "gas" as § 430.2, quoted above, makes clear. Moreover, the DOE has not published a representative average unit cost for kerosene pursuant to section 323(b)(2) of the EPCA, which would be necessary to perform the test procedure calculations for determining estimated annual operating costs. Therefore, the DOE test procedures for water heaters as presently constituted are not applicable to water heaters designed to utilize kerosene fuel, unless such products are also designed to utilize electricity, natural gas, propane, or No. 2 heating oil as an alternative fuel energy source.

[45 FR 24862, Apr. 11, 1980]

RULING 1980-2—ALLOCATION OF MOTOR GASOLINE AT RETAIL SALES OUTLETS*I. Introduction*

The Department of Energy (DOE) has received numerous complaints and inquiries regarding discrimination by sellers of motor gasoline at retail sales outlets. During periods in which motor gasoline is in short supply, discriminatory treatment among purchasers has the effect of withdrawing gasoline from the public market. Granting preferential treatment to selected purchasers disadvantages the general public. Purchasers not engaged in an activity entitled to an allocation level¹

¹The DOE provides priorities in the form of "allocation levels" to users engaged in

Continued

are denied equitable access to motor gasoline when sellers employ illegal discriminatory practices. Such practices frustrate the Mandatory Petroleum Allocation Program, which is based on the equitable distribution of allocated petroleum products among all purchasers. See section 4(b)(1)(F) of the Emergency Petroleum Allocation Act of 1973, as amended Pub. L. No. 93-159 (November 27, 1973) (EPAA). This Ruling is therefore intended to clarify, with particular emphasis on retail sales outlets of motor gasoline, the provisions of the regulations that require sellers equitably to distribute allocated products to all purchasers. This Ruling also addresses certain limited situations in which retail gasoline sellers may establish priorities for certain categories of purchasers, and in which State governments may require or authorize such priorities pursuant to authority delegated under DOE regulations.

II. Mandatory Petroleum Allocation Program for Motor Gasoline

Section 2(b) of the EPAA sets forth as the overall purpose of the Act to minimize the effect of shortages or dislocations of refined petroleum products on the economy and the American people.² In furtherance of this purpose, section 4 of the Act directs the President to promulgate regulations to accomplish the Act's enumerated objectives to the maximum extent practicable. Among those objectives is the equitable distribution of refined petroleum products throughout

certain activities. The allocation levels for motor gasoline are set forth in 10 CFR 211.103.

²Section 2(b) of the EPAA provides: The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

the United States.³ Implementing regulations are intended to distribute all allocated products in an equitable manner by establishing certain priority uses. Specifically, 10 CFR 210.62(b) prohibits discrimination by all sellers of allocated products. As indicated in Ruling 1974-6, 39 FR 6111 (February 19, 1974), certain forms of preferential treatment are not considered to frustrate or impair the objectives or purposes of the EPAA and therefore do not constitute discrimination for purposes of § 210.62(b).⁴

Section 210.62(b) provides:

No supplier shall engage in any form of discrimination among purchasers of any allocated product. For purposes of this paragraph, "discrimination" means extending any preference or sales treatment which has the effect of frustrating or impairing the objectives, purposes and intent of this chapter or of the Act, and includes, but is not limited to, refusal by a retail marketer of motor gasoline or diesel fuel to furnish or sell any allocated product due to the absence of a prior selling relationship with the purchaser.

³See section 4(b)(1)(F) of the EPAA, which states that the regulations shall provide for:

... equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users ...

⁴Ruling 1974-6 explained that the following practices did not frustrate or impair the objectives or purposes of the EPAA:

- (1) Uniform application of a State "odd-even" sales program for motor gasoline;
- (2) Application of the allocation regulations to make priority allocation levels of motor gasoline available to certain categories of purchasers;
- (3) Compliance with a State set-aside order to make certain amounts of gasoline available to a particular purchaser; and
- (4) Continuation of a preference in sales of motor gasoline which was established before the effective date of the Mandatory Petroleum Allocation Regulations, by which a firm extended preferential treatment to commercial accounts and bulk purchasers for commercial uses, provided that the preference is not implemented in such a way as to circumvent the objectives of the allocation program.

er, or establishment of new volume purchase arrangements where customers or retailers agree in advance to purchase in excess of normal amounts of motor gasoline or diesel fuel and thereby receive preferential treatment. (Emphasis added.)

The DOE and its predecessors have also recognized the importance and desirability of giving appropriate priority to certain purchasers of motor gasoline. Accordingly, various subparts of the Mandatory Petroleum Allocation Regulations applicable to specific allocated products set forth priority allocation levels. With respect to motor gasoline, § 211.103 grants to specified categories of wholesale purchaser-consumers and end-users that qualify as bulk purchasers the right to purchase specified volumes of motor gasoline from their base period suppliers.⁵

Section 211.103(d) provides in part that end-users which are not bulk purchasers and purchasers not entitled to an allocation level shall be supplied in accordance with the provisions of § 211.10(d)(2). The regulations provide in § 211.10(d)(1) for a first priority to purchasers entitled to an allocation level, and § 211.10(d)(2) requires that the supplier "distribute equitably the remainder of the supplier's allocable supply among all end-users or wholesale purchaser-consumers which are not entitled to an allocation level. . . ." (Emphasis added.)⁶

Therefore, absent action by DOE or State governments to establish priorities among retail purchasers in accordance with §§ 211.10(d) and 211.103, as discussed in Section III of this Ruling, and except for sales to purchasers entitled to an allocation level under § 211.103, retail gasoline dealers must make motor gasoline

available for sale to all purchasers on an equitable basis, without discrimination.

Examples

The following examples address typical situations involving retail gasoline marketing. These examples are not exhaustive and are meant only to be illustrative of violations of § 210.62(b). All of the firms in the examples are retail marketers of motor gasoline, and none of the purchasers (including the commercial customers) are bulk purchasers.

Each example is also based on the assumption that no governmental action of the type described in § III of this Ruling has been taken in the jurisdiction in which a firm conducts its business.

1. Firm A has recently instituted a practice of allowing "regular" customers to be served before other customers waiting in line to be served at the seller's pumps. Previously and during the base period, Firm A sold gasoline on a "first-come, first-serve" basis.

Firm A is in violation of the express language of § 210.62(b), which prohibits discriminating in favor of "regular" customers, i.e., those with a "prior purchasing relationship." The firm must serve the public on a "first-come, first-serve" basis, i.e., all customers must wait their turn in line to purchase gasoline if that was the firm's mode of operation during the base period.

2. Firm B sold motor gasoline on a "first-come, first-serve" basis during the base period and now sells by appointment only. The number to call for appointments is prominently displayed at the retail sales outlet.

The effect of Firm B's practice is to discriminate against non-local customers in violation of § 210.62(b), because a gasoline-by-appointment-only system favors regular and local purchasers who are in a better position to schedule their gasoline purchases in advance while non-local customers, especially traveling motorists, are unable to do so. As the new appointment system was not in effect during the base period, it also violates § 210.62(a).

⁵As defined in § 211.51, the term "wholesale purchaser-consumer" is limited to include only purchasers that receive delivery of the particular allocated product in their own storage tanks. "End-user" is defined in § 211.51 as "an ultimate consumer of an allocated product other than a wholesale purchaser-consumer."

⁶That part of § 211.10(d)(2) not quoted here authorizes the establishment of certain priorities for retail purchasers of allocated products, including motor gasoline, by State governments and is addressed in § III of this Ruling.

3. Firm C operates a parking lot as well as a retail sales outlet for motor gasoline and historically sold motor gasoline to any member of the public. The firm recently instituted a practice of selling motor gasoline only to customers that parked their cars in the parking lot.

Firm C's practice not only constitutes discrimination under § 210.62(b) in favor of patrons of its parking lot in which space is necessarily limited, but also violates § 210.62(d), which prohibits the sale of gasoline contingent upon the purchase of any other service. Firm C may not refuse to sell motor gasoline to any interested purchaser during whatever normal business hours it currently maintains for retail sales of motor gasoline.

4. A group of investors proposes to form an entity, Firm D, to purchase a retail sales outlet from Firm E and to sell or transfer all of its motor gasoline only to members of the group or other individuals selected by Firm D.

Firm D's proposal would violate § 210.62(b) because it would discriminate in favor of privately selected members and purchasers of motor gasoline by directing transfers of motor gasoline only to those customers. In addition, the investors would not succeed to the allocation entitlement for the retail sales outlet, since by so altering the basic commercial practices of their predecessor, the investors would have failed to establish the same ongoing business required by § 211.106(e) for a transfer of allocation entitlement of a successor on the site.

III. Establishment of Allocation Priorities at Retail Sales Outlets by State Governments

Section 211.10(d) is addressed to the supply obligations of a supplier whose purchasers are end-users or wholesale purchaser-consumers, when these purchasers include some purchasers that are entitled to an allocation fraction and others that are not. This regulation establishes that the first priority of each supplier is to fulfill its obligation to those purchasers entitled to an allocation fraction in accordance with § 211.10(c) and further provides, in pertinent part:

The second priority for each supplier shall be to distribute equitably the remainder of the supplier's allocable supply among all end-users or wholesale purchaser-consumers which are not entitled to an allocation level. A state may require or authorize priorities to or among such end-users or wholesale purchaser-consumers purchasing the allocated product for the uses listed in the allocation levels for that product in the subpart of this part applicable to the particular allocated product. (§ 211.10(d)(2)).

With respect to motor gasoline, priority uses and the allocation levels to which they are entitled are set forth in § 211.103.

Based on § 211.10(d)(2) a State may establish priorities for purchasers and require or authorize sellers to supply them on a priority basis. The State may, for example, establish a priority for purchasers driving vehicles involved in emergency services or passenger transportation services, as listed in § 211.103(b) and defined in § 211.51, by exempting such purchasers from any maximum purchase limitations imposed on all other purchasers. The State may allow sellers to serve such priority purchasers outside of the hours during which others may purchase motor gasoline, or the State may direct that such priority purchasers not have to wait in line with other purchasers to be served. The State is not required to grant priority treatment to all of the uses listed for the allocation levels in § 211.103 or to arrange priorities in the order set forth in that provision. Section 211.10(d)(2) merely enables a State to respond to its particular needs by establishing priorities with respect to end-users that are not otherwise entitled to allocation levels and whose uses correspond to those listed in § 211.103 (b) and (c).

The State may not adopt its own priority levels, i.e., give priority at retail sales outlets for uses other than those specifically listed in § 211.103 (b) and (c). Furthermore, it should be noted that this regulation is supplemented by the State set-aside program (set forth in § 211.17) and by other specific delegations of authority made to the States by the executive branch. One such delegation has taken the form of an executive order of the President

permitting States to establish odd-even license plate plans for designated purchasers of motor gasoline.⁷

A State may establish priorities either by utilizing existing State authority or by utilizing the authority delegated to States by § 211.10(d)(2). Section 501 of the Department of Energy Organization Act, Pub. L. No. 95-91 (August 4, 1977) applies to a State's use of delegated authority to achieve the objectives of the EPAA. Such official action should be taken in writing, and full notice of that action should be given to the public and to all sellers affected.

When establishing priority treatment for certain purchasers in accordance with § 211.10(d)(2), State governments are exempted from the prohibitions of § 210.62. In that regard, Section 211.10(d)(2) states:

Priority treatment, per se, when granted in accordance with the provisions of this subparagraph, shall not be considered a form of discrimination among purchasers or any other prohibited conduct under § 210.62 of this chapter.

This provision therefore permits sellers to provide preferential treatment to priority end-users where directed by their State government in accordance with § 211.10(d)(2).

[45 FR 42246, June 24, 1980]

RULING 1980-3—CLARIFICATIONS TO THE NEWLY DISCOVERED CRUDE OIL CEILING PRICE RULE

On April 27, 1979, the Department of Energy (DOE) issued a final rule which provides in 10 CFR 212.79 that, effective June 1, 1979, first sales of "newly discovered crude oil" are not subject to the ceiling price limitations set forth in 10 CFR Part 212, Subpart D. 44 FR 25828 (May 2, 1979). The newly discovered crude oil ceiling price rule was intended to optimize domestic crude oil production by removing ceiling price limitations from certain do-

mestic crude oil production. Section 212.79 provides in relevant part:

(a) *Rule.* Notwithstanding the provisions of § 212.73(a), first sales of newly discovered crude oil on or after June 1, 1979 are not subject to the ceiling price limitations of this subpart.

(b) *Definitions.* For purposes of this section—

"Newly discovered crude oil" means domestic crude oil which is: (1) Produced from a new lease on the Outer Continental Shelf; or (2) *produced* (other than from the Outer Continental Shelf) from a property from which no crude oil was produced in calendar year 1978. (Emphasis added.)

Inasmuch as numerous inquiries have been received concerning the use of the term "property" in § 212.79, the DOE is concerned that some properties for which this rule was intended to provide production incentives may remain undeveloped. Specifically, some producers are uncertain as to the status under the rule of crude oil produced from a reservoir from which no crude oil was produced in calendar year 1978, where the particular reservoir had not been designated as a separate property during 1978. Some requests for interpretation have suggested that the DOE interpret the newly discovered crude oil rule in a manner contrary to the express language of the rule. For example, some producers have asserted a right to certify as "newly discovered" the crude oil production of properties from which crude oil was in fact "produced" during calendar year 1978, based upon an erroneous interpretation of the term "produced." Accordingly, we are issuing this Ruling to clarify the meanings of the terms "property" and "produced" with respect to the newly discovered crude oil ceiling price rule.

I. APPLICATION OF THE DEFINITION OF "PROPERTY"

The incentive price for newly discovered crude oil is available on a property-by-property basis, and the DOE noted that the definition of "property," as set forth in 10 CFR 212.72 and as clarified by the DOE through rulings, adjudications, and interpreta-

⁷Executive Order No. 12140, 44 FR 31159 (May 31, 1979), as amended by Executive Order No. 12162, 44 FR 56665 (October 2, 1979), delegated authority to the Governors to establish an odd-even license plate plan, to require minimum purchases of gasoline, and to regulate the hours and days of operation for retail sales outlets.

tions, would be applicable to the newly discovered crude oil ceiling price rule. 44 FR at 25829, n.2. Prior to September 1976, "property" was defined in § 212.72 as "the right which arises from a lease or from a fee interest to produce domestic crude oil." The definition of "property" in § 212.72 was amended, effective September 1, 1976, to allow certain separate and distinct producing reservoirs to be treated as separate properties for purposes of the DOE price regulations. "Property" is defined in § 212.72 as follows:

"Property" means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation. (Emphasis added.)

In Ruling 1977-2, 42 FR 4409 (January 25, 1977), the Federal Energy Administration (FEA), a predecessor to the DOE, stated that a separate and distinct producing reservoir subject to the same right to produce as other reservoirs may be designated as a separate property in accordance with § 212.72 at any time on or after September 1, 1976, so long as that designation is given prospective effect only. Ruling 1977-2 reads in pertinent part:

With respect to the treatment of separate reservoirs as separate properties, FEA has not required that such decisions be made immediately for every property. To the contrary, producers are permitted to make separate reservoir determinations at any time or on or after September 1, 1976. Of course, post-September 1, 1976 determinations to treat separate reservoirs as separate properties must become effective from the first day of the month in which such a decision is made and may not be applied retroactively beyond the two-month recertification restriction of 10 CFR 212.72. Under no circumstances are such determinations permitted to affect volumes of crude oil produced and sold prior to the September 1, 1976 effective date of the amendment to the definition of property. 42 FR at 4112.

Prior to 1978 a producer may not have designated separate and distinct reservoirs subject to the same right to produce as separate properties. As the

DOE did not require that such designations be made within any period of time, there may have been no reason, for example, for a producer to designate as separate properties two separate and distinct reservoirs subject to the same right to produce, where one reservoir had no crude oil production.¹ A producer would benefit from such a designation only after crude oil production was initiated from the reservoir. At that time, designating as a separate property a reservoir from which crude oil had not previously been produced and sold would permit all crude oil production from the reservoir-property to be classified as new crude oil and sold at upper tier ceiling prices. It is such a reservoir—a reservoir for which upper tier ceiling prices were not a sufficient incentive to result in crude oil production—for which the newly discovered crude oil ceiling price rule was expressly intended to provide additional incentives for production.

In an instance where crude oil production is either resumed or initiated from a separate and distinct producing reservoir from which no crude oil was produced in calendar year 1978, a producer is undertaking a financial investment that may involve a high degree of risk as contemplated by the newly discovered crude oil rule. This risk could exist despite that fact that crude oil was produced in calendar year 1978 from a separate and distinct producing reservoir subject to the same right to produce.²

¹ In some instances a crude oil producer is required to designate separate and distinct producing reservoirs as separate properties. Ruling 1977-2 states that once a producer elects to treat a separate reservoir as a separate property, all separate and distinct producing reservoirs subject to the same right to produce must be treated as separate properties.

² Indeed, the fact that this financial risk is involved is the basis upon which the DOE, through its predecessor agency the FEA, determined that it was appropriate for a separate and distinct producing reservoir subject to the same right to produce to be designated as a separate property. Ruling 1977-2 noted:

Continued

Based on our review of the definition of "property," and the clear and express purpose of the price incentive for newly discovered crude oil, we conclude that the incentive applies to reservoir-properties from which no crude oil was produced in 1978, even if those reservoir-properties were not specifically designated as separate properties in 1978. Thus, where no crude oil was produced from a separate and distinct producing reservoir subject to the same right to produce crude oil in calendar year 1978, and where such a reservoir is properly designated as a separate property either before or after December 31, 1978, pursuant to § 212.72, as clarified in Ruling 1977-2, the crude oil produced and sold from such a reservoir-property after June 1, 1979, is eligible to be classified as newly discovered crude oil. As stated in Ruling 1977-2, the designation of a separate and distinct producing reservoir as a separate property is not to be applied retroactively to recertify crude oil as "newly discovered" beyond two months or before the recognition of the separate reservoir by the appropriate governmental authorities, and this Ruling does not require or permit any recertification of crude oil that would be otherwise impermissible. 10 CFR 212.72, 212.131.

The principal objective in permitting producers to treat separate reservoirs as separate properties is to maximize the incentive to increased production by allowing:

Decisions regarding the exploration for and development of crude oil reserves (to be) made on an individual reservoir basis without regard to the happenstance of production characteristics of other reservoirs underlying the same tract. (41 FR at 38178.)

Therefore, for example, FEA believes that where a producer is faced with the expenditure of large sums of capital to initiate measures designed to increase production from one producing reservoir—or to develop new reserves subject to the same right to produce—the producer should be permitted to measure the benefits of such a decision against the real risks, and should not be required to take into account the production characteristics of other producing entities, *"the production from which is not physically affected by actions taken with respect to the producing entity under consideration."* 42 FR at 4112.

As discussed above, it is the premises of the property as it existed in calendar year 1978 or as it may have been redesignated in 1978 on a reservoir basis pursuant to 10 CFR Part 212, Subpart D and Ruling 1977-2 that may qualify crude oil production from the property for incentive prices. The newly discovered crude oil ceiling price rule was intended to optimize domestic crude oil production by encouraging production from properties from which no crude oil was produced in calendar year 1978. Accordingly, the rule provides for a one-time determination of a property's eligibility to produce newly discovered crude oil. DOE regulations therefore do not permit rearrangements of rights to produce that may occur after 1978, through pooling, the creation of new drilling or spacing units, or otherwise, to qualify crude oil produced from such a rearranged property as newly discovered. For the newly discovered crude oil ceiling price rule, the standard to be applied to properties based on a rearranged right to produce is not whether crude oil was produced in calendar year 1978 from the physical premises of the property as rearranged, but rather whether these physical premises were part of a property that had crude oil production in calendar year 1978.

II. MEANING OF THE TERM "PRODUCED"

The DOE has also received many inquiries concerning what constitutes a property from which no crude oil was produced in calendar year 1978 for purposes of qualifying crude oil production as newly discovered crude oil pursuant to § 212.79. The criterion established by § 212.79(b) is not whether crude oil was produced and sold, produced in commercial quantities³ or

³The proposed regulations for newly discovered crude oil would have permitted crude oil production from a "new reservoir" from which crude oil was not produced in commercial quantities prior to January 1, 1979, to qualify for incentive prices without reference to the drilling and distance requirements proposed for other crude oil production. 44 FR at 1889. However, the DOE decided not to adopt the drilling require-

Continued

produced pursuant to state production allowables from the property during calendar year 1978. These additional factors were not incorporated into 10 CFR 212.79 and are not relevant to the determination of whether crude oil production from the property may be certified as newly discovered crude oil. The fact that crude oil was produced from a property prior to calendar year 1978 also is not relevant to a determination of whether that property's crude oil production after June 1, 1979, may receive incentive prices where that property had no crude oil production in calendar year 1978.⁴

If crude oil was produced from a property in measurable amounts in calendar year 1978, crude oil production from the property may not be certified and sold as newly discovered crude oil. Even though only 50 barrels of crude oil were produced in well tests from a property in calendar year 1978, for example, crude oil production from the property may not be certified and sold as newly discovered crude oil.

ments and the corresponding "commercial quantities" language in the final rule on newly discovered crude oil.

A number of producers have filed requests for interpretations with the DOE, contending that the language of the Conference Report to the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223 (April 2, 1980), retroactively amends the DOE's definition of "newly discovered crude oil" in 10 CFR 212.79. While the Windfall Profit Tax Act purports to adopt the meaning of "newly discovered oil" that was "given to such term by the June 1979 energy regulations," the Conference Report notes that for purposes of the windfall profit tax, "newly discovered oil" may be produced and sold from "a property which did not produce oil in commercial quantities," where "production was incident to the drilling of exploratory or test wells and was not part of continuous or commercial production from the property during 1978." Whatever the effect of this language on the meaning of "newly discovered oil" for windfall profit tax purposes, it cannot retroactively change the meaning of the term "newly discovered crude oil" for DOE pricing purposes under § 212.79.

On June 16, 1980, we issued a Notice of Proposed Rulemaking that proposed amendments to the definition of "newly discovered crude oil." 45 FR 42222 (June 23, 1980).

Only crude oil "produced from a property" affects the determination as to whether crude oil may be certified and sold as newly discovered crude oil. In some cases crude oil may be borrowed or purchased from another property and pumped into a well to stimulate production or to prepare the well for operation. The recovery of such oil used to "frac" or "wash" a well on a property does not in itself constitute production of crude oil from that property. Therefore, the recovery of "frac" or "wash" oil from a property in calendar year 1978 that did not produce measurable amounts of crude oil from an underground reservoir does not prevent the property from receiving the benefits of the newly discovered crude oil ceiling price rule.

[45 FR 48577, July 21, 1980]

RULING 1980-4—CLARIFICATION OF DEFINITION OF "OPERATIONAL"

The Department of Energy (DOE) seeks to clarify the definition of "operational" set forth in 10 CFR 515.20(c)(23), applicable to transitional facilities under the Powerplant and Industrial Fuel Use Act of 1978 (FUA), Pub. L. 95-620 (November 9, 1978).¹ A "transitional facility" is defined in § 515.20(c)(30) as "a facility which was not operational on April 20, 1977, but for which a contract for the construction or acquisition was signed prior to November 9, 1978." (Emphasis added.) See § 515.1(a). The regulatory term "operational" is one that aids in distinguishing between "existing" and "new" facilities for the purpose of determining the FUA prohibitions applicable to an electric powerplant or major fuel-burning installation (MFBI).

Under the FUA an electric powerplant or a MFBI is classified as either an "existing" unit subject to the prohibitions of Title III, or a "new" unit subject to the prohibitions of Title II. An existing electric powerplant and an existing MFBI are defined in the FUA² and in the implementing regula-

¹ 42 U.S.C. 8301 *et seq.* (November 9, 1978).

² FUA section 103(a) (9) and (12).

tions³ as any powerplant or MFBI other than a "new" powerplant or a "new" MFBI. A new electric powerplant and a new MFBI are defined in the FUA⁴ and in the implementing regulations⁵ as any electric powerplant or MFBI for which construction or acquisition began on or after the date of the FUA's enactment, November 9, 1978. A "new" unit is also one for which construction or acquisition began after April 20, 1977, and before November 9, 1978. The FUA presumes that all transitional units are "new" unless the DOE classifies such a unit as "existing" for the reasons set forth in section 103(a) (8) and (11) of the FUA, as implemented by 10 CFR Part 515, Transitional Facilities.

"New" electric powerplants or MBFIs may be absolutely prohibited under Title II of the FUA from using natural gas or petroleum as a primary energy source unless granted an exemption from the prohibition. However "existing" units are subject to less stringent prohibitions under Title III of the FUA. Part 515 of 10 CFR specifies the criteria by which the DOE will classify electric powerplants or MBFIs as existing units subject to the prohibitions of Title III rather than continuing to subject the units to the prohibitions of Title II of the FUA as "new" units.

One such distinguishing criterion is whether the unit is "operational." For an electric powerplant as well as a MFBI, § 515.20(c)(23) defines "operational" as follows:

"Operational" means that a unit is used and useful, has completed its testing phase and is capable of producing a product or providing a service on a continuing basis.

The definition of an "operational" unit set forth in § 515.20(c)(23) has two requirements. The first is that the unit is "used and useful." The second is that the unit "has completed its testing phase and is capable of producing a product or providing a service on

a continuing basis." This standard was established to distinguish between those "new" MBFIs and electric powerplants that are subject to reclassification as "existing" units pursuant to the regulations governing transitional facilities and those units that will still be classified as "new" units. A unit that was operational on April 20, 1977, is clearly an "existing" unit. However, a unit that "was not operational on April 20, 1977, but for which a contract for the construction or acquisition was signed prior to November 9, 1978," is a transitional facility which may be either a new unit or an existing unit depending upon whether the construction or acquisition could be cancelled, rescheduled or modified without substantial financial penalty or significant operational detriment. The two-part definition of "operational" performs a single differentiation between "existing" and "new" facilities. In the performance of this function, the requirement that a unit be "used and useful" has the same meaning as the requirement that a unit "has completed its testing phase and is capable of producing a product or providing a service on a continuing basis." Only when employed in relation to a unit in this unified manner does the definition of "operational" in 10 CFR Part 515 properly and uniformly differentiate between "existing" units and "new" units.

Accordingly, an electric powerplant may be considered "operational" if it is capable of providing the service of producing "electric power for purposes of sale or exchange"⁶ and has completed its testing phase. Such a powerplant would be "used and useful." A MFBI may be considered "operational" when a boiler, gas turbine unit, combined cycle unit, or internal combustion engine⁷ is capable of producing a product or providing a service on a continuing basis and has completed its testing phase as performed by the manufacturer and/or supplier of the particular MFBI. Such a MFBI would

³ 10 CFR 500.2; see also 10 CFR Part 504, Existing Electric Powerplants, and Part 506, Existing Major Fuel-Burning Installations.

⁴ FUA section 103(a) (8) and (11).

⁵ 10 CFR 500.2; see also 10 CFR Part 503, New Electric Powerplants, and Part 505, New Major Fuel-Burning Installations.

⁶ See the definition of "electric powerplant" in section 103(a)(7) of the FUA.

⁷ See the definition of "major fuel-burning installation" in section 103(a)(10) of the FUA.

be "used and useful." In the case of a package boiler purchased for use as a MFBI, for example, the applicable DOE regulations permit a unit to qualify as "operational" as of a specific date for the purposes of implementing 10 CFR Part 515 even if the particular MFBI had not been installed or tested by the purchaser, so long as the purchaser had acquired a unit that the manufacturer had tested.

[45 FR 69211, Oct. 20, 1980]

RULING 1981-1—QUESTIONS AND ANSWERS RELATING TO THE EFFECT OF THE EXECUTIVE ORDER DECONTROLLING CRUDE OIL AND REFINED PETROLEUM PRODUCTS ON THE MANDATORY PETROLEUM ALLOCATION AND PRICE REGULATIONS

On January 28, 1981, the President signed Executive Order 12287, 46 FR 9909 (January 30, 1981), exempting all crude oil and refined petroleum products from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended (15 U.S.C. 751 *et seq.* (1976)) (EPAA). This Order was effective at 12:01 a.m., January 28, 1981.¹ This Ruling is issued in order to promote the immediate implementation of this Executive Order. It answers some of the questions received by the Department of Energy (DOE) concerning the Executive Order and DOE regulations after January 27, 1981.

Question #1: Are firms required to follow the reporting, record-keeping, and record maintenance requirements set forth in the Mandatory Petroleum Allocation and Price Regulations after 12:01 a.m., January 28, 1981?

Answer #1: Section 2 of the Executive Order states that: "[a] 11 reporting and record-keeping requirements in effect under the Emergency Petroleum Allocation Act, as amended, shall continue in effect until eliminated or modified by the Secretary of Energy." Accordingly, until the Secretary of Energy promulgates regulations changing the record-keeping requirements, all existing records must be

maintained in their current form, and no existing records may be altered or destroyed. Records that relate to matters occurring after January 27, 1981 are still subject to ongoing reporting or regulatory requirements, and must also be maintained. For example, crude oil producers and crude oil resellers must continue to certify each barrel of crude oil sold in accordance with 10 CFR 212.131, although after January 27, 1981 the crude oil is exempt from any pricing restrictions. In addition, all reports required to be filed by firms for the periods prior or subsequent to January 28, 1981, must still be filed with the appropriate officials until these reporting requirements are modified or eliminated. The on-going record-keeping and reporting requirements also are subject to 10 CFR 205.202 which prohibits any practice that circumvents or contravenes the requirements of the regulations. The failure to maintain, or the destruction or alteration of records, or the failure to submit reports accurately to the DOE could subject a firm to both civil and criminal penalties.

Question #2: How does the Executive Order affect the issuance of entitlements notices for the period prior to January 28, 1981 under 10 CFR 211.66 and 211.67 (the Entitlements Program)?

Answer #2: In section 3 of the Executive Order the Secretary of Energy is given authority to promulgate entitlements notices for periods prior to January 28, 1981, and further to establish a mechanism for entitlements adjustments for periods prior to the Executive Order. Thus, the Secretary will publish in February 1981 an entitlements notice which accounts for crude oil runs to stills in December 1980. The Secretary will also publish in March 1981 an entitlements notice reflecting crude oil runs to stills from January 1, 1981 through January 27, 1981.

For the month of January 1981, each refiner is required to report all information required by the Form ERA-49, the Domestic Crude Oil Entitlements Program Refiners Monthly Report, pursuant to the provisions of 10 CFR 211.66 and 211.67 and the instructions set forth in the Form ERA-

¹Executive Order 12287 is effective at 12:01 a.m., January 28, 1981, in each different time zone. See 15 U.S.C. 262 (1976). Thus, while the Order was effective on the East Coast at 12:01 a.m., e.s.t., January 28, 1981, it was not effective on the West Coast until 12:01 a.m. p.s.t., January 28, 1981.

49. Each refiner will report its actual crude oil runs to stills for that month. However, each refiner shall also report in Item 7 in the Form ERA-49 its actual crude oil runs to stills in the first 27 days of January 1981, or if it does not have that information available, its crude oil runs to stills for the full month of January 1981, multiplied by the fraction 27/31, which will be deemed the firm's crude oil runs to stills for the first 27 days of the month. In a footnote to Item 7, a refiner shall state which method of computation for the first 27 days of January it used in its Form ERA-49.

Each refiner will be required further to report its receipts of crude oil as set forth in 10 CFR 211.66(h) and Form ERA-49, for the entire month of January 1981. Each refiner will also report for the first 27 days of the month its crude oil receipts as set forth in Items 4, 5, 6, 9, and 10 in the Form ERA-49 on the basis of actual crude oil receipts for the first 27 days of January or, if the refiner does not have that information available, on the basis of receipts for the full month, multiplied by 27/31. In a footnote to Items 4, 5, 6, 9, and 10 each refiner shall state which method of computation for the period January 1 through 27, 1981, it used on the Form ERA-49. All reporting and record-keeping requirements will remain in effect. Thus, crude oil must be certified by its proper regulatory classification, such as lower tier, upper tier, etc., even though after January 27 the crude oil could be sold without regard to price controls. Refiners, therefore, should have data as to the tier and type of crude oil received for the entire month of January 1981.

Moreover, each refiner that is otherwise eligible to receive entitlements for eligible products under 10 CFR 211.67(a)(3) or for petroleum substitutes under 10 CFR 211.67(a)(5), or that is required to adjust its volume of crude oil runs to stills pursuant to 10 CFR 211.67(d), shall report in Item 7 or 8 of the Form ERA-49 the volume of eligible products, petroleum substitutes, or reduction in runs to stills for the entire month of January 1981. In addition, each refiner will report its actual volume of eligible products and

petroleum substitutes or will adjust its crude oil runs to stills for the first 27 days of January 1981. If that information is not available, a refiner will report the volume of eligible products or petroleum substitutes or will adjust its crude oil runs to stills by multiplying the monthly calculation of such volumes or the crude oil runs to stills, respectively, by the fraction 27/31. In a footnote to Item 7 or 8 of the Form ERA-49 each refiner shall state which method of computation for the first 27 days of January it used.

Each non-refiner that is eligible to receive entitlements for eligible products under 10 CFR 211.67(a)(3) or for petroleum substitutes under 10 CFR 211.67(a)(5) is required to report its volume of the eligible products or petroleum substitutes for the entire month of January 1981. In addition, each firm will report its volume of eligible products or petroleum substitutes for the first 27 days of January 1981. If that information is not available, the firm must multiply the full monthly volume of the eligible products or petroleum substitutes by the fraction 27/31. Each firm shall state which method of computation for the first 27 days of January it used.

The DOE will develop a mechanism to implement any adjustments to the Entitlements Program resulting from changes or corrections in crude oil receipts, runs to stills, volumes of other eligible products or volumes of petroleum substitutes by refiners and other eligible firms for months or partial months prior to January 28, 1981.

Question #3: How was a producer to determine the volumes of upper and lower tier crude oil produced and sold from a property during January 1981?

Answer #3: Executive Order 12287 does not affect the determination of the base production control level of a property for the full month of January 1981. Thus, the volumes of old (lower tier) crude oil and new (upper tier) crude oil produced and sold from a property must be determined according to the procedures found in 10 CFR Part 212, Subpart D, for the full month of January 1981. Crude oil produced and sold from a property prior to January 28, 1981, was subject to the pricing requirements of 10 CFR Part

212, Subpart D, and the certification requirements at 10 CFR 212.131. Neither the price regulations of 10 CFR Part 212, Subpart D nor the certification provisions of 10 CFR 212.131 specify any sequence of sale or identify which particular barrels of crude oil are to be sold at lower tier or upper tier ceiling prices. However, a producer was required to deal with purchasers of its crude oil in accordance with its normal business practices as set forth in 10 CFR 210.62 with respect to that purchaser and was not to discriminate among any purchasers of its crude oil in its sale of upper tier or lower tier crude oil during January 1981. A producer's variance from its historical sales practices with respect to a purchaser in January 1981 could be evidence of behavior proscribed under 10 CFR 210.62.

Accordingly, crude oil sold before January 28, 1981 that was properly certified as lower tier or upper tier crude oil was subject to the ceiling price limitations of 10 CFR Part 212, Subpart D. Crude oil sold after January 27, 1981 is exempt from any ceiling price limitation whether or not it was certified as lower tier or upper tier crude oil.

Question #4: May a producer obtain market level prices from a purchaser for crude oil produced prior to January 28, 1981, but sold after January 27, 1981?

Answer #4: The contract terms between a purchaser and a seller determine whether the producer of controlled crude oil produced prior to January 28, 1981, but sold after the effective date of the Executive Order, may obtain market-level prices for its crude oil production. The Mandatory Petroleum Price Regulations do not affect sales after 12:01 a.m., January 28, 1981. The question of the time of sale is to be answered by reference to the contract or agreement, not by reference to the Mandatory Petroleum Allocation and Price Regulations.

Question #5: May crude oil sold in the months of December 1980 and January 1981 be retroactively recertified (or certified) in accordance with 10 CFR 212.131 by a crude oil producer within the consecutive two-month

period immediately following the month the sale was made?

Answer #5: If crude oil would have otherwise qualified for lawful recertification (or certification) prior to the implementation of the Executive Order, a producer may recertify (or certify) crude oil sold in the months of December 1980 and January 1981 pursuant to 10 CFR 212.131(a)(6) within the consecutive two-month period immediately following the month in which the sale was made. For example, in March 1981 a producer could recertify upper tier crude oil sold in January 1981 as tertiary incentive crude oil if the crude oil would have otherwise qualified for that classification. After March 1981 no such recertifications can be made by a producer of crude oil.

Question #6: May a producer or reseller of controlled crude oil, either lower tier or upper tier crude oil sold prior to January 28, 1981 retroactively increase its price to market level after decontrol if the producer or reseller cannot lawfully recertify the crude oil under 10 CFR 212.131(a)(6) or 212.131(b), respectively?

Answer #6: A producer or crude oil reseller is not permitted to increase retroactively its price for controlled crude oil that it sold prior to January 28, 1981, if the producer or reseller cannot lawfully recertify the crude oil pursuant to 10 CFR 212.131(a)(6) or 212.131(b), respectively. However, if a producer or crude oil reseller can lawfully certify or recertify crude oil pursuant to 10 CFR 212.131(a)(6) or 212.131(b), respectively, that producer or crude oil reseller may of course do so.

Question #7: May a firm first become a qualified producer as defined in 10 CFR 212.78(c) on or after January 28, 1981? Moreover, may the retroactive recertification of crude oil sold in the months of December 1980 and January 1981 as tertiary incentive crude oil be used to recover recoupable allowed expenses that are incurred, paid, and reported after the effective date of the Executive Order, but within the consecutive two-month period within which retroactive certification is permitted under 10 CFR 212.131(a)(6)?

Answer #7: The Tertiary Incentive Program provides that first sales of crude oil by or on behalf of a qualified producer are not subject to the ceiling price limitations of 10 CFR Part 212, Subpart D, provided that the tertiary incentive revenue does not exceed the allowed expenses attributable to the producer. Tertiary incentive revenue is the difference between the controlled price and the market price received by the qualified producer in accordance with 10 CFR 212.78 and constitutes the front-end money which is the incentive that the program is intended to provide.

Absent the Executive Order, a qualified producer that would have incurred, paid, and reported its allowed expenses prior to February 28 and March 31, 1981, respectively, could have recovered those expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as those recertifications were made within the consecutive two-month period within which such certification is permitted under 10 CFR 212.131(a)(6). Executive Order 12287 is intended to provide for an immediate decontrol of crude oil and refined petroleum products. The Order does not abrogate the right that accrued to a firm to establish prices for crude oil prior to January 28, 1981. Thus, a firm may become a qualified producer as defined in 10 CFR 212.78(c) on or after January 28, 1981. A qualified producer may also recover allowed expenses through the recertification of crude oil sold in the months of December 1980 and January 1981, respectively, as long as the producer has incurred, paid, and reported those expenses prior to February 28 and March 31, 1981, respectively.

Question #8: How does a crude oil reseller compute its lawful prices pursuant to 10 CFR Part 212, Subpart L for the period January 1 through January 27, 1981?

Answer #8: A crude oil reseller must generally compute its average markup on a monthly basis under 10 CFR 212.183(a). The average markup is the total revenue in sales of properly certified crude oil by the reseller, less the lawful costs and expenses associated

with such sales of crude oil in the month, divided by the number of barrels of crude oil sold by the reseller in the month. See 10 CFR 212.182. Since only a 27-day period rather than the full month was subject to price controls, a crude oil reseller's average markup would also reflect prices charged after the exemption of crude oil from price controls. Since some sales of crude oil could be made at prices that were exempt from the price regulations, the average markup could lawfully exceed the permissible average markup of 20 cents per barrel during January 1981. Accordingly, no valid comparison of a crude oil reseller's average markup with its permissible average markup of 20 cents per barrel can be made for the month of January 1981.

In addition, prior to January 28, 1981, crude oil resellers were subject to 10 CFR 212.183(a) which prohibits any markup in certain specified sales of crude oil and to 10 CFR 212.186 which prohibits any markup in a sale in which a reseller performs no service or other function traditionally and historically associated with the resale of crude oil. Moreover, crude oil resellers were subject to all other provisions of 10 CFR Part 212, Subpart L and the certification provisions of 10 CFR 212.131 prior to January 28, 1981. Until further notice, crude oil resellers also must continue to maintain records and file reports in conformance with 10 CFR 212.187.

Question #9: May a seller of refined petroleum products retroactively increase its selling price to a purchaser for a covered product actually sold prior to January 28, 1981?

Answer #9: A seller may not, through a retroactive price assessment, increase its selling price for a covered product sold prior to January 28, 1981 to a level in excess of its maximum lawful price to a purchaser as that concept is discussed in 10 CFR Part 212, Subparts E, F, and K for the period in which the product was sold. A retroactive increase in price will be considered part of the price charged for a product for the period prior to January 28, 1981, and could result in the initiation of enforcement action.

Question #10: Must a retailer of motor gasoline continue to post either the maximum lawful selling price for each grade of motor gasoline or a certification that the maximum lawful selling price for each grade of motor gasoline has been calculated by the retail seller and that the actual selling price for that type or grade of gasoline is either equal to or less than the maximum lawful selling price pursuant to 10 CFR 212.129(b)?

Answer #10: The posting requirement is neither a reporting nor a recordkeeping requirement. Thus, a retailer of motor gasoline is no longer required to continue posting either its maximum lawful selling prices for each grade of motor gasoline or a certification concerning the lawfulness of its prices under 10 CFR 212.129(b) after January 27, 1981.

Question #11: May a firm obtain an exception, stay, modification, or special redress or other relief from the Office of Hearings and Appeals pursuant to 10 CFR Part 205, Subparts D, I, J, and R, respectively, from the terms of Executive Order 12287 which exempts crude oil and refined petroleum products from the Mandatory Petroleum Allocation and Price Regulations as of 12:01 a.m., January 28, 1981?

Answer #11: No firm may obtain from the Office of Hearings and Appeals an exception, stay, modification of or special redress relief from the provisions of the Executive Order which exempts crude oil and refined petroleum products from the Mandatory Petroleum Allocation and Price Regulations.

Question #12: Is that state set-aside for motor gasoline set forth at 10 CFR 211.17 still in effect?

Answer #12: The Executive Order exempts all refined petroleum products, including motor gasoline, from all allocation and pricing regulations promulgated under the Emergency Petroleum Allocation Act of 1973, except as expressly provided. The State set-aside program for gasoline was established as part of those regulations and was not excepted from the provisions of the Executive Order. Therefore, the state set-aside for motor gasoline is no longer in effect. However, under the terms of the Executive Order, the

State set-aside program for middle distillates remains in effect until March 31, 1981.

[46 FR 12946, Feb. 19, 1981]

RULING 1981-2—DETERMINATION OF COMMERCIAL UNMARKETABILITY

The Department of Energy (DOE) seeks to clarify the criteria for determining whether liquid, solid, or gaseous waste by-products, and in certain cases natural gas, are commercially unmarketable under the Powerplant and Industrial Fuel Use Act of 1978 (FUA), Pub. L. 95-620 (November 9, 1978).¹ The expression "commercially unmarketable" is used in § 103(a) of the FUA to describe certain substances that qualify as alternate fuels and to describe substances that do not qualify as natural gas or as petroleum. Thus, it aids in distinguishing between fuels the use of which is prohibited under the FUA and fuels the use of which is permitted under the FUA.

Pursuant to Title II of the FUA, new electric powerplants and major fuel-burning installations (MFBI) are subject to certain prohibitions against the use of natural gas or petroleum. Title III of the FUA subjects existing electric powerplants and MFBI to prohibitions against the use of natural gas or petroleum. However, the use of fuels that are not defined as "natural gas" or "petroleum" is not prohibited. To determine whether or not the use of a certain fuel is prohibited, one distinguishing criterion is a determination of commercial unmarketability.

The FUA uses the criterion of commercial unmarketability to exclude certain fuels from the definitions of "natural gas" and "petroleum" and to include other fuels in the definition of "alternate fuels." This is accomplished in § 103(a) of the FUA, which defines these terms in pertinent part as follows:

(3)(A) Except as provided in subparagraph (B), the term "natural gas" means any fuel consisting in whole or in part of—

- (i) Natural gas;
- (ii) Liquid petroleum gas;

¹ 42 U.S.C. 8301 et seq. (November 9, 1978).

(iii) Synthetic gas derived from petroleum or natural gas liquids; or

(iv) Any mixture of natural gas and synthetic gas.

(B) The term "natural gas" does not include—

(i) Natural gas which is commercially unmarketable (either by reason of quality or quantity), as determined under rules prescribed by the Secretary

• • • • •

(4) The term "petroleum" means crude oil and products derived from crude oil, other than—

(A) Synthetic gas derived from crude oil;

(B) Liquid petroleum gas;

(C) Liquid, solid, or gaseous waste byproducts [sic] of refinery operations which are commercially unmarketable, either by reason of quality or quantity, as determined under rules prescribed by the Secretary; or

(D) Petroleum coke or waste gases from industrial operations • • •

• • • • •

(6) The term "alternate fuel" means electricity or any fuel, other than natural gas or petroleum, and includes—

• • • • •

(B) Liquid, solid, or gaseous waste byproducts [sic] of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity, as determined under rules prescribed by the Secretary [Emphasis added.]

Each of the definitions designates two ways in which a by-product or natural gas may be commercially unmarketable. One is by reason of quality; the other is by reason for quantity.

As authorized by the FUA, the Secretary of Energy prescribed rules specifying further the qualitative and quantitative criteria under which a fuel may be deemed commercially unmarketable. On May 8, 1979, the DOE issued interim regulations that included criteria for determining commercial unmarketability in 10 CFR Part 507 of the interim regulations. 44 FR 28950 (May 17, 1979). The preamble to the

interim regulations discussed costs that were considered appropriate to the interim evaluation of commercial unmarketability. 44 FR at 28971-74.

However, after receiving numerous comments in response to an extended comment period and after reviewing the interim rule in light of its implementation, the DOE revoked Part 507 and issued final regulations on May 30, 1980. 45 FR 38276 (June 6, 1980), effective August 5, 1980. The final regulations revised the provisions applicable to commercial unmarketability. The definitions of "alternate fuels," "natural gas," and "petroleum" in 10 CFR 500.2 set forth the concept of commercial unmarketability in pertinent part as follows:

"Alternate fuel" means electricity or any fuel, other than natural gas or petroleum. The term includes, but is not limited to:

• • • • •

(4) Liquid, solid, or gaseous waste by-products of refinery or industrial operations which are commercially unmarketable, either by reason of quality or quantity. (For purposes of this subparagraph (4), the term "waste by-product" is defined as an unavoidable by-product of the industrial or refinery operation.)

(i) A waste by-product of a refinery operation is commercially unmarketable if it meets the criteria listed in the definition of petroleum set forth below.

(ii) A waste by-product of an industrial operation is commercially unmarketable either by reason of:

(A) Quality, where the cost of processing (limited to upgrading the product to commercial quality), storing and distributing the by-product would not be covered by reasonably expected revenues from its sale; or

(B) Quantity, where the cost of aggregating the by-product into commercial quantities through storing and distributing the by-product would not be covered by reasonably expected revenues from its sale. . . .

• • • • •

"Natural gas" . . . does not include:

(2) Natural gas which is commercially unmarketable by reason of:

(i) Quality, where the cost of producing, upgrading to commercial quality, storing, and distributing the gas would not be covered by reasonably expected revenues from its sale; or

(ii) Quantity, where the quantities of natural gas are so small that the revenues to be reasonably expected from the sale of the gas would not cover the cost of its production, distribution, or storage. . . .

"Petroleum" means crude oil and products derived from crude oil, other than:

(1) Petroleum products specifically designated as alternate fuels pursuant to these regulations . . .

(5) A liquid, solid, or gaseous waste by-product of refinery operations which is commercially unmarketable by reason of:

(i) Quality, where the cost of processing (limited to upgrading the product to commercial quality), storing, and distributing the by-product would not be covered by reasonably expected revenues from its sale; or

(ii) Quantity, where the cost of aggregating the product into commercial quantities through storage and distributing the by-product would not be covered by reasonably expected revenues from its sale. [Emphasis added.]

Thus, the DOE has determined that the inability to cover by reasonably expected sales revenues the costs associated with handling the quality or quantity of a certain by-product or natural gas would make that fuel commercially unmarketable. Consequently, the use of such a fuel would not be prohibited by the FUA since the fuel would not be "natural gas" or "petroleum."

As the DOE indicated in the preamble to the final regulations, the issue of unmarketability must be examined on a case-by-case basis because the unmarketability of a specific waste by-

product depends on the factual circumstances surrounding its production. 45 FR at 38276. The DOE also recognized "the difficulties" that exist with respect to the issue of commercial unmarketability and stated in the preamble that it is "prepared to respond to requests for guidance or clarification concerning commercial unmarketability." 45 FR at 38279. Accordingly, this Ruling is issued to clarify these final regulations set forth in § 500.2.

In any analysis of commercial unmarketability, a firm must use its own commercial standards to assess the costs associated with a particular fuel on a case-by-case basis, depending upon the fuel concerned. In each case, the ultimate determination is whether a by-product or natural gas is commercially unmarketable because the costs of overcoming problems posed by its quality or quantity would not be covered by reasonably expected revenues from its sale. However, a determination of commercial unmarketability applies only to a specific fuel and only when the fuel is burned by its producer.

The final regulations indicate that costs associated with upgrading, storing, distributing, and aggregating a by-product or natural gas may be included to assess the commercial unmarketability of any fuel. The DOE also recognizes that such cost computations may properly include a reasonable rate of return on any capital investment required to overcome the problems posed by the quality or quantity of a fuel because the return on investment is a normal aspect of any investment decision. A firm may account for this reasonable rate of return by using its customary discount rate for an investment of similar risk.

For example, a firm may base its cost calculations on a net present value methodology (similar to the methodology set forth in §§ 503.6 and 504.12).² This calculation may employ

²It is important to note, however, that in any determination regarding the approval of an exemption to enable the use of petroleum or natural gas, a cost test that is specifically set forth in § 503.6 and § 504.12, and that is different from the cost analysis outlined in this Ruling, is used.

(1) either the estimated life of the venture which would generate the fuel or the estimated physical life of any capital equipment which would be purchased for handling the fuel and (2) the discount rate which is the firm's customary rate for an investment of similar risk.

The DOE recognizes that as part of any consideration of the rate of return on investment a firm would also assess the cost of replacing the Btu's lost if the by-product or natural gas were upgraded and sold instead of used as a fuel by the firm. Accordingly, a firm may account for the actual expense that would result from burning a replacement fuel in lieu of the by-product or natural gas in question.³ The costs associated with using a replacement fuel are indirect costs that result from upgrading and selling the fuel, instead of burning it. These indirect costs as well as the direct costs associated with upgrading, storing, distributing, and aggregating of by-products or natural gas are necessarily implied by the provisions of the final regulations and may be considered by a firm in any assessment of commercial unmarketability.

Thus, the analysis described herein may be used by a firm to determine that a particular fuel is commercially unmarketable by reason of the costs associated with remedying problems posed by its quality or quantity. Once a fuel is determined to be commercially unmarketable, a firm may use it without being subject to the prohibitions of the FUA.

[46 FR 26606, May 14, 1981]

RULING 1981-3—APPLICATION OF THE MANDATORY PETROLEUM PRICE REGULATIONS TO UNLEADED GASOLINE SALES BY RESELLERS, RESELLER-RETAILERS, AND RETAILERS

This ruling is intended to provide guidance on the application of the Mandatory Petroleum Price Regulations¹ to sales of unleaded gasoline by

resellers, reseller-retailers, and retailers. During the period of petroleum price controls, gasoline was a "covered product"² subject to maximum allowable prices under 10 CFR Part 212.³ The general price rules for sales of covered products by resellers, reseller-retailers, and retailers⁴ were contained

in the regulations adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended (EPAA), Pub. L. No. 93-159 (November 27, 1973), 15 U.S.C. 751 *et seq.* (1976). Effective March 30, 1981, the regulations discussed in this Ruling were revoked. 46 FR 20508 (April 3, 1981).

¹ The term "covered product," which was defined in § 212.31, included gasoline. The term "gasoline" was originally defined in § 212.31 as:

"... any of the various grades of retail gasoline other than aviation gasoline.

39 FR 1924, 1950 (January 15, 1974). The term "gasoline" was subsequently amended to read:

"... all of the various grades, other than aviation gasoline, of refined petroleum naphtha which, by its composition, is suitable for use as a carburant in internal combustion engines.

40 FR 2795, 2796 (January 16, 1975). Thus, gasoline for use in motor vehicles (other than aviation gasoline), whether regular or premium, leaded or unleaded, was a covered product under the Mandatory Petroleum Price Regulations.

² EPAA section 4(a) directed as follows:

"... (T)he President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation "... Such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States. [Emphasis added.] The term "refined petroleum product" was defined in EPAA section 3(5) as "gasoline, kerosene, distillates (including No. 2 fuel oil), LPG, refined lubricating oils or diesel fuel." Thus, the EPAA made no distinctions between premium, regular, and unleaded gasoline. Each of these types of gasoline was subject to allocation and price controls. See 10 CFR 212.2 and 10 CFR 212.10 as originally promulgated, 39 FR 1924, 1950 (January 15, 1974) and as amended, 40 FR 60036, 60037 (December 31, 1975).

⁴ The terms "reseller," "reseller-retailer," and "retailer" were also defined in 10 CFR 212.31.

³ This Ruling does not apply to residual fuel oil, which DOE does not consider a by-product subject to a determination of its commercial unmarketability.

¹ Effective January 28, 1981, Executive Order 12287, 46 FR 9909 (January 30, 1981) exempted crude oil and refined petroleum products from the price and allocation con-

in Part 212, Subpart F. Within that Subpart, § 212.93(a) set forth the general price rule for sales of gasoline by these firms. As originally promulgated effective January 14, 1974, that regulation provided in relevant part:

A seller may not charge a price for any item subject to this subpart which exceeds the weighted average price at which the item was lawfully priced by the seller in transactions with the class of purchaser concerned on May 15, 1973, plus an amount which reflects on a dollar-for-dollar basis, increased costs of the item.

39 FR 1924, 1959 (January 15, 1974).

On May 23, 1974, the Federal Energy Office (FEO)⁶ issued an interim rule at § 212.112 effective June 1, 1974 (the June interim rule), specifying the manner in which the price rules of Part 212 applied to determine maximum allowable prices for unleaded gasoline by refiners and by resellers, reseller-retailers, and retailers, that did not sell unleaded gasoline on May 15, 1973, or within the 30-day period prior to that date. For affected resellers, reseller-retailers, and retailers, the June interim rule specified how unleaded gasoline was to be priced under the general price rule for those firms set forth at § 212.93(a). Section 212.112(b) provided:

(ii) For purposes of determining under § 212.93(a) the weighted average price at which unleaded gasoline was lawfully priced by the seller in transactions on May 15, 1973, a reseller, reseller-retailer, or retailer shall not use a price in excess of the weighted average price at which premium grade gasoline was lawfully priced by it with the class of purchaser concerned on May 15, 1973; and

(iii) For purposes of computing under § 212.92 the "increased cost" of unleaded gasoline, a reseller, reseller-retailer, or retailer shall use the difference between the weighted average unit cost of unleaded gasoline in inventory and the weighted average unit cost of premium grade gasoline in inventory on May 15, 1973.

⁶The FEO was the predecessor of the Federal Energy Administration (FEA) whose functions under the EPAA were transferred to the Department of Energy (DOE) under the Department of Energy Organization Act (DOEOA), 42 U.S.C. 7101 *et seq.* (Supp. III 1979).

39 FR 18638 (May 29, 1974). A similar regulation was promulgated at § 212.112(b)(1) for refiners subject to the refiner price formulae of 10 CFR Part 212, Subpart E. *Id.* Thus, under the June interim rule, affected refiners, resellers, reseller-retailers, and retailers were required to calculate their maximum allowable prices for unleaded gasoline to a class of purchaser by reference to the prices they lawfully charged for premium grade gasoline in transactions⁷ on May 15, 1973.

The June interim rule at § 212.112(b) was amended effective July 10, 1974 (July rule). The July rule also specified in § 212.112(b) the manner in which the reseller, reseller-retailer, and retailer price rules in Part 212, Subpart F applied, stating in pertinent part:

(2) for purposes of determining, under § 212.93(a), the weighted average price at which unleaded gasoline was lawfully priced by the seller in transactions with the class of purchaser concerned on May 15, 1973, a reseller, reseller-retailer, or retailer shall use a price not in excess of the weighted average price at which leaded gasoline of the same or nearest octane number was lawfully priced by it in transactions with that class of purchaser on May 15, 1973; and

(3) for purposes of computing under § 212.92 the "increased costs" of unleaded gasoline, a reseller, reseller-retailer, or retailer shall use the difference between the weighted average unit cost of unleaded gasoline in inventory and the weighted average unit cost of leaded gasoline of the same or nearest octane number in inventory on May 15, 1973.

"Transaction" was defined in 10 CFR 212.31 as:

... an arm's-length sale between unrelated persons which are not members of a controlled group (as defined in 26 U.S.C. 1563(a)) and is considered to occur at the time and place when a binding contract is entered into between the parties.

39 FR 1924, 1951 (January 15, 1974) (as amended 40 FR 60036, 60038 (December 31, 1975)).

⁷The June interim rule was held invalid for failure to meet the applicable requirements of proper notice and opportunity for comment set forth in the Administrative Procedure Act. *Consumers Union of the United States, Inc. v. Saatchi*, 393 F. Supp. 639 (D.D.C.), *aff'd per curiam*, 523 F.2d 1404 (temp. Emer. Ct. App. 1975).

39 FR 24923, 24924 (July 8, 1974).

A similar regulation was promulgated at § 212.112(b)(1) for refiners. *Id.* Thus, the July rule required affected sellers to calculate their maximum allowable prices in sales of unleaded gasoline to a class of purchaser by reference to the prices they lawfully charged for leaded gasoline of the same or nearest octane number in transactions on May 15, 1973.

On April 5, 1978, the Temporary Emergency Court of Appeals (TECA) held that the July rule for refiners was adopted in violation of two procedural requirements for rulemaking which were contained in the Federal Energy Administration Act of 1974 (FEAA), Pub. L. No. 93-275 (May 7, 1974), 15 U.S.C. 761 *et seq.* (1976) (current version at 15 U.S.C. 761 *et seq.* (Supp. II 1978)), and was therefore void. *Shell Oil Co. v. Federal Energy Administration*, 574 F. 2d 512 (1978), *aff'd* 440 F. Supp. 876 (D.C. Del. 1977). The court found that in promulgating the July rule FEA had failed to comply with FEAA section 7 (1)(C), 15 U.S.C. 766(1)(C) (1976) (repealed 1977), which required the agency to provide to the public an opportunity for oral presentation of views, and with section 7(1)(B), 15 U.S.C. 766(1)(B) (1976) (repealed 1977), requiring the agency to provide an opportunity for comment for at least 10 days after a proposed rule is noticed in the Federal Register.⁸ With respect to the 10-day comment requirement the court expressly rejected the agency's claim that the comment period provided by the agency for the June interim rule applied to the July rule for refiners, because the June interim rule varied too greatly from the July rule for comments on the June interim rule to apply to the July regulation. 574 F. 2d at 517. ⁹ FEA also did not

provide an opportunity for oral presentation of views on the reseller, reseller-retailer, and retailer unleaded price rule. Furthermore, the differences between the June interim rule and July rule for these firms were similar to the differences between the June interim rule and July rule for refiners. Thus, DOE has determined that, under the reasoning of the *Shell* decision, it will not seek to give effect to the July unleaded gasoline rule for resellers, reseller-retailers, and retailers (§ 212.112(b)(2) and (3)).

Accordingly, the rule prescribing maximum allowable prices which resellers, reseller-retailers, and retailers could have charged for unleaded gasoline under Part 212 remains § 212.93(a) and other applicable regulations in Part 212. As stated in the Preamble to the June interim rule, 39 FR at 18638, FEA intended only to supplement the general reseller, reseller-retailer, and retailer price rules for all covered products (including unleaded gasoline) set forth at Part 212, with these special unleaded gasoline price rules. *See* Preamble to Final Price Rule for Unleaded Gasoline, 39 FR at 24923. In the absence of these special rules, these firms have been required to price unleaded gasoline under the provisions of Part 212 applicable to sales of gasoline.

[46 FR 54721, Nov. 4, 1981]

RULING 1983-1—QUESTIONS AND ANSWERS RELATING TO THE APPLICABILITY TO THE PETROLEUM VIOLATION ESCROW FUNDS OF REGULATIONS OF THE ENERGY CONSERVATION PROGRAMS ADMINISTERED BY THE DEPARTMENT OF ENERGY TO WHICH THESE FUNDS MAY BE DISTRIBUTED UNDER SECTION 153 OF THE FURTHER CONTINUING APPROPRIATIONS ACT, FISCAL YEAR 1983

On December 21, 1982, the President signed into law the Further Continuing Appropriations Act, Fiscal Year 1983, Pub. L. 97-377 (the Act). Section

⁸Procedural requirements for rulemaking by DOE are contained in DOEAO § 501 (as amended), 42 U.S.C. 7191 (Supp. III 1979).

⁹In a recent court decision, the possible application of *Shell* to the reseller, reseller-retailer, and retailer unleaded gasoline price rule was discussed. *Power Test Petroleum Distributors, Inc. v. DOE*, No. 81-293 (D.D.C., Mar. 31, 1981) (Memorandum Opinion dismissing action for declaratory judgment and injunctive relief based on the

plaintiff's failure to exhaust its administrative remedies), appeal docketed, No. DC-86 (Temp. Emer. Ct. App., April 28, 1981). A number of sellers of unleaded gasoline against whom DOE has initiated enforcement proceedings have also raised this issue.

155 of the Act provides in pertinent part:

(b) As soon as practicable, the Secretary of Energy shall disburse designated petroleum violation escrow funds to the Governors of the States in accordance with the formula set forth in subsection (d).

(c) Amounts disbursed to the Governor of any state shall be used by the Governor as if such funds were received under one or more energy conservation programs. The Governor shall identify to the Secretary within one year after the time of disbursement the energy conservation program or programs to which the funds are or will be applied. Funds disbursed under this section shall be used to supplement, and not supplant, funds otherwise available for such programs under Federal or State law.

(e) For purposes of this section—

(2) The term "energy conservation programs" means—

(A) the program under part A of the Energy Conservation and Existing Buildings Act of 1976 (42 U.S.C. 6861 and following);

(B) the programs under part D of title III of the Energy Policy and Conservation Act (relating to primary and supplemental State energy conservation programs; 42 U.S.C. 6321 and following);

(C) the program under part G of title III of Energy Policy and Conservation Act (relating to energy conservation for schools and hospitals; 42 U.S.C. 6371 and following);

(D) program under the National Energy Extension Service Act (42 U.S.C. 7001 and following); and

(E) the program under the Low-Income Home Energy Assistance Act of 1981 (42 U.S.C. 8621 and following).

(3) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(4) The term "Governor," when used with respect to any State, means the Governor or the chief executive officer of that State.

(f) No funds disbursed under this section may be used for any administrative expenses of the Department of Energy or of any State, whether incurred in connection with any energy conservation program or otherwise.

Pursuant to Section 155 (b) and (d), the Secretary of Energy announced the disbursement of a total of \$200,000,000 to the several States, the District of Columbia, the Commonwealth of Puerto Rico and several territories of the United States (the States) on January 31, 1983. As noted above, these funds are to be used by the States as if such funds were received under one or more of the five programs set forth in Section 155 (e)(2) of the Act. Four of these programs, the Weatherization Assistance Program, 42 U.S.C. 6861 *et seq.*, the State Energy Conservation Program, 42 U.S.C. 6321 *et seq.*, the Schools and Hospitals Grant Program, 42 U.S.C. 6371 *et seq.*, and the Energy Extension Service, 42 U.S.C. 7001 *et seq.* (the DOE programs), are administered by the DOE. The Low-Income Home Energy Assistance Program, (LIHEAP), 42 U.S.C. 8621 *et seq.* is administered by the Department of Health and Human Services (HHS).¹

The statutory language has raised a number of questions concerning the manner in which the Section 155 funds may be used by States.

In issuing this ruling, DOE hopes to clarify the relationship of Section 155 of the Act to the four DOE conservation programs.

Question #1: Do the regulations of the DOE energy conservation programs to which a Governor disburses Section 155 funds apply to those funds?

Answer #1: The statute and its legislative history indicate that the regulations governing each of the four DOE programs apply to the Section 155 funds, once a Governor disburses some of the funds to that program, as if the funds had been appropriated by the Federal government for that program. In addition, if there is a conflict between the provisions of Section 155 of the Act and a provision of the program regulations, the provisions of Section 155 will apply. Section 155(c) reads, in part: "Amounts disbursed to the Governor of any State shall be

¹ HHS is developing guidelines to assist States in applying the LIHEAP regulations to the Section 155 funds.

used by the Governor as if such funds were received under one or more energy conservation programs." In commenting on this section on the floor of the House of Representatives, Congressman Dingell, Chairman of the Committee on Energy and Commerce, stated that "the rules and regulations applicable to these programs would apply to these funds as well." 128 Cong. Rec. H10,435 (daily ed. Dec. 20, 1982). On the floor of the Senate, Senator Hatfield stated that Section 155 funds should be obligated "under the rules and regulations which govern those activities [energy conservation programs] as though the funds had been received for those programs" and that this procedure "provides fiscal accountability upon the use of money by the States." 128 Cong. Rec. S15, 702-S15, 703 (daily ed. Dec. 20, 1982).²

Question #2: May Section 155 funds be used for the administrative expenses of a State in operating one of the four DOE programs, if Federally appropriated funds are permitted to be used for such expenses under the regulations of a particular program?

Answer #2: Under Section 155(f) of the Act, a State may not use Section 155 funds for administrative expenses. This applies even though Federally appropriated funds are permitted to be used for such expenses under the regulations of a particular program to which the Section 155 funds are applied by the State. "Administrative expenses" are those expenses which States have historically considered to be administrative expenses under each program.

Question #3: May a subgrantee use the Section 155 funds for administrative expenses?

Answer #3: A subgrantee may not use Section 155 funds for administrative expenses. Section 155(f) provides that: "No funds disbursed under this

section may be used for any administrative expenses of the Department of Energy or of any State, whether incurred in connection with any energy conservation program or otherwise." This statutory language does not appear to exclude any level of grantee from the prohibition of the expenditure of Section 155 funds for administrative expenses. The legislative history of Section confirms this reading of the statutory language by indicating a strong intention that the funds benefit only the type of people injured by the violators who contributed to the fund and that they not be used for administrative expenses by any level of recipient. 128 Cong. Rec. S15, 702-S15, 703 (daily ed. Dec. 20, 1982) (remarks of Sen. Hatfield) and 128 Cong. Rec. H10,434-H10,437 (daily ed. Dec. 20, 1982) (remarks of Rep. Dingell). As Congressman Dingell stated on the floor of the House of Representatives: "... our intent here is to benefit people, just as we would do if the money were provided directly to injured persons. Thus, we provided that none of the funds should be used for administrative expenses." (emphasis added) 128 Cong. Rec. H10,435 (daily ed. Dec. 20, 1982.) However, both Congressman Dingell and Senator Hatfield indicated that this provision should not limit the use of funds for those direct services, such as labor costs, associated with low-income weatherization and retrofit activities.

Question #4: May a State use funds appropriated by the Federal government for the four DOE energy conservation programs to administer the Section 155 funds?

Answer #4: A State may use Federal funds appropriated for a program to administer the Section 155 funds applied to that program. However, a State may use no more appropriated funds for administrative expenses than an amount that equals the percentage of both appropriated and Section 155 program funds as limited by the relevant DOE regulations or, if no regulatory limit applies, established by the State's historic use of these appropriated funds for administrative expenses. State expenses for administering the DOE conservation programs

² The agreement on this point of two members of Congress with particular interest in and knowledge of Section 155 outweighs the general reluctance to use statements of individual legislators made during debates on a bill to ascertain the meaning of the full legislative body. D. Sand, Sutherland Statutory Construction § 48.13 (4th ed. 1973).

can be taken only from appropriated funds and not from Section 155 funds.

This result is required if effect is to be given to all the provisions of Section 155, read together. The primary goal of the legislation was the expeditious disbursement of the Section 155 funds by the States. 128 Cong. Rec. S15,114-S15,117 (daily ed. Dec. 16, 1982) (remarks of Senators Warner, Dole, and Percy). Without ready access to adequate administrative funds, States would face substantial difficulty in assuring the proper and rapid disbursement of the Section 155 funds. Nevertheless, Section 155(f) of the Act prohibits the use of Section 155 funds for administrative expenses. However, it does not prohibit the use of other appropriated funds for such expenses. Each of the programs in which Section 155 funds may be used permits appropriated funds to be used for administrative expenses. Section 155(c) provides that Section 155 funds shall be used as if such funds were received under the energy conservation program or programs designated by the respective governors. Thus, it would appear that appropriated funds may be used to administer Section 155 funds.

However, such use is subject to significant limitations also. Section 155(c) states that "funds disbursed under this section shall be used to supplement, and not supplant, funds otherwise available for such programs under Federal or State laws." Federally appropriated funds for these programs are "funds otherwise available for such programs" and are available for both administrative and direct program expenses.³ Reading this provi-

sion of Section 155(c) with Section 155(f) (the prohibition on using Section 155 funds for administrative expenses) would seem to indicate that the legislation intended to supplement those funds being used for actual or direct program expenses, not the funds used for administrative expenses, and not to supplant funds that are available for direct program expenses. This type of supplanting could occur if all non-Section 155 funds not previously allocated for administrative expenses were used for the expenses of administering the Section 155 funds.

However, effect must also be given to the language and intent of that portion of Section 155(c) that requires the Section 155 funds to be used as if received under the chosen conservation program. Thus, after the funds are designated for use in that program, they are to be treated as normal appropriated funds for regulatory purposes. Hence, the effect of combining the Section 155 funds and appropriated funds is to increase the base (the total funds available for the program) against which any program limitation on the use of funds available for the program is measured. Two of the programs have a percentage of the funds available for the program which may be used for administrative expenses set by regulation. In the other two programs there is no regulatory limit; however, the States have reported their administrative expenses to the Department from which the percentage of the available funds historically used for administrative expenses can be calculated. Considering the Congressional concern with administrative expenses, and giving effect to all provisions of Section 155, these percentages should be applied to the total of the Section 155 funds plus the appropriated funds to obtain the total amount available for administrative expenses. However, because of the express prohibition of Section 155(f), funds actually used for administrative expenses must be derived only from appropriated funds, not Section 155 funds.

Specifically, regulations of the Weatherization Assistance Program and the Schools and Hospitals Grant Program limit the amount of funds

³ If the language in Section 155(c) providing that Section 155 funds supplement and not supplant, funds otherwise available for the authorized programs under Federal or State law were interpreted to prohibit use of the "otherwise available" funds for administrative expenses, it would require a State to obtain money entirely outside of the authorized programs to administer Section 155 funds, and could require new State legislative actions before the Section 155 funds could be disbursed. This absurd result would defeat the legislation's purpose of distributing the funds as quickly as practicable.

available for the program which could be used for administrative expenses. Thus, when the Section 155 funds increase the amount of funds available for the program, the same limitation applies to the new total of funds available for the program. Therefore, the five percent available to the State for administration of the Schools and Hospitals Grant Program under the program regulations, 10 CFR § 455.62, and the five percent made available for administration of the Weatherization Assistance Program under that program's regulation (not more than ten percent for States and subgrantees), 10 CFR § 440.16, would in each case be five percent of the total of the Federal funds allocated to the State plus the Section 155 funds applied by the State to the program.

In addition, there are two programs for which there is no statutory or regulatory limit on administrative costs. These are the State Energy Conservation Program and the Energy Extension Service. In these programs, States may only increase their administrative budget by an amount which equals the percentage of a program's funds used in past years for administrative expenses multiplied by the total funding available for the program. This limitation is required to give effect to the provisions of Section 155(c) mandating that Section 155 funds supplement, not supplant, funds otherwise available for those programs.

Question #5: Must the Section 155 funds be expended by the States during a particular period of time?

Answer #5: Section 155 does not require a State to spend the Section 155 funds during a particular period of time. A State is also permitted to reallocate the funds from one eligible program to another, as long as the funds had not been expended. Thus, the provisions of the regulations and statute of the Schools and Hospitals Grant Program requiring DOE to reallocate among all the States funds not spent or obligated in a particular State during a particular fiscal year do not apply to the Section 155 funds.

Question #6: Do the recordkeeping, reporting, auditing, and monitoring requirements of the DOE program regulations also apply to the Section 155

funds? If so, must these funds be recorded and reported separately?

Answer #6: The monitoring, reporting, auditing, and recordkeeping requirements of the program regulations apply to these funds as if they were Federally appropriated funds. However, there is no requirement that records kept and reports made for the DOE programs have severable data on the disposition of the Section 155 funds, except that the Governor of each State must make the report required in Section 155(c) identifying the programs to which the funds were or will be applied.

Question #7: Do the States need to include provisions regarding the Section 155 funds in their new applications or amend current applications or State plans to cover the use of these funds?

Answer #7: States are required to include provisions in their new applications regarding the use of Section 155 funds or amend their current applications, State plans, or both to include the increase in program budget and production caused by the application of the Section 155 funds. New applications should be submitted in accordance with normal program procedures and OMB Circulars. Amendments to current applications and plans should be submitted at the same time as new applications. A new plan or application or an amendment to an existing plan or application is required when additional appropriated funds are allotted to a particular program. Since Section 155(c) requires the Section 155 funds be used as if such funds were received under the particular program to which they were applied, a new application or amendment is also required for Section 155 funds. However, such new applications or amendments do not need to be submitted before the Section 155 funds are used in a particular program. Congress intended the funds to be disbursed expeditiously and did not make their disbursement conditional upon receipt or amendment of an application or State plan.

A State is also required to amend its application or plan if it intends to use the funds for a purpose not provided for in the application or plan. For example, if a State wanted to apply

funds disbursed to the State Energy Conservation Program to a measure not included in its State plan, it would have to amend the plan according to the procedures set forth in the program regulations before it funds the new measure. A State may also amend its current application, State plan, or both for other reasons as long as it follows the normal program procedures for making such amendments.

Question #8: Are the Civil Rights Act (42 U.S.C. 2000d), the Davis-Bacon Act (42 U.S.C. 276a), Office of Management and Budget Circulars, DOE Financial Assistance Rules, and other Federal requirements applicable to the Section 155 funds?

Answer #8: They are applicable to the extent they are applicable to Federally appropriated funds under the program regulations.

Question #9: Since grants under the Schools and Hospitals Grant Program are normally made by the DOE rather than by the States, what procedures should a Governor use if the State wants to apply some of the Section 155 funds to this program?

Answer #9: To apply these funds to the Schools and Hospitals Grant Program the State energy office should act as a coordinating agency under the program regulations and treat the funds as Federally appropriated funds. Thus, the State energy office would have the reporting, monitoring, recordkeeping, and auditing responsibilities it normally has under the program regulations when acting as a coordinating agency. The funds would be disbursed by the States to the institutions on the basis of a ranking of applications from schools and hospitals approved by DOE under the program regulations. The disbursement of the Section 155 funds from the States to the institutions and the approval of the ranking of applications for these funds by DOE would take place at the same time in the FY 1983 or later grant cycle for the program as the disbursement or Federally appropriated funds from DOE to the institutions and the ranking of applications for Federally appropriated funds by DOE.

Question #10: Must an institution provide funds to match a grant of Section 155 funds made under the Schools

and Hospitals Grant Program? Must a State provide additional funds to match the Section 155 funds applied to the Energy Extension Service (EES)? May a State under the EES or an institution under the Schools and Hospitals Grant Program use the Section 155 funds to fulfill its obligation to match Federally appropriated funds?

Answer #10: An institution must provide funds to match a grant of Section 155 funds made under the Schools and Hospitals Grant Program; however, a State does not need to provide additional funds to match the Section 155 funds applied to the EES. As indicated in the legislative history of Section 155, the reason for requiring the funds to be applied to five particular programs and their regulations was to control the purpose for which the funds were to be used by the States and to provide fiscal accountability upon their use. 128 Cong. Rec. E5,327-E5,328 (daily ed. Dec. 18, 1982) (remarks of Rep. Dingell); 128 Cong. Rec. H10,434-H10,437 (daily ed. Dec. 20, 1982) (remarks of Rep. Dingell); and S15,702-S15,703 (daily ed. Dec. 20, 1982) (remarks of Sen. Hatfield). The Schools and Hospitals Grant Program matching requirement is the type of control on the use of Federally appropriated funds Congress intended to be applicable to the Section 155 funds. The language of the statute requiring a match refers to the requirement in terms of a limitation on the use of funds. 42 U.S.C. 6371e(b)(1). Moreover, to ensure that the funds are used most effectively to produce the greatest energy savings, the program emphasizes a competition among a wide variety of projects from a large number of applicants. 10 CFR Part 455. Requiring an applicant to provide half of the funds for its project increases the likelihood that the applicant is proposing the most efficient projects and providing accurate cost figures and the likelihood that the competition will insure the most efficient use of Federally appropriated funds. Accordingly, the matching requirement must apply to the Section 155 funds disbursed under the Schools and Hospitals Grant Program.

The EES matching requirement, however, is not intended to be a control on the use of Federally appropriated funds and is not intended to be applicable to the Section 155 funds. The language of the statute requiring a match for EES does not limit the use of appropriated funds but only requires the funds available to the program to be augmented by the States. Section 1007(b), Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35. Moreover, Congress has no need to control the use of EES funds similar to its need regarding the Schools and Hospitals funds because it knows how the funds will be distributed. Congress itself determined by statute who the recipients will be (the States) and how they will use the funds and determined by the appropriation process the amount of funds each applicant will receive. 42 U.S.C. 7001 *et seq.* In addition, Senator Warner, who introduced the original amendment to the Continuing Resolution which became Section 155, indicated that the States were unable to provide additional financial assistance to the public for energy purposes and that one purpose of the amendment was to provide the needed financial assistance to the States in order to enable them to provide such energy assistance. 128 Cong. Rec. S15,114-S15,116 (daily ed. Dec. 16, 1982). Nothing in the legislative history of the debates on the amendment indicates that the intention of Congress changed in this regard. A concern with a State's inability to help its citizens and an intention to aid the States in this connection would be inconsistent with requiring States to apply additional funds to match the Section 155 funds.

A State cannot under the EES program, and an institution cannot under the Schools and Hospitals Grant Program, use the Section 155 funds to fulfill its obligation to match Federally appropriated funds. Section 155 funds applied to both programs are required to be used as if they had been received under those programs. Section 155(c). Funds received under both programs cannot be used to meet matching requirements. In addition, Section 155(c) requires a State not to use Section 155 funds to supplant State funds other-

wise available for energy conservation programs.

Question #11: In reporting energy savings under the State Energy Conservation Program (SECP), should a State report the savings due to the expenditure of Section 155 funds for that program?

Answer #11: The State should report energy savings due to actions taken under the SECP which were funded by the Section 155 funds in the same manner that it reports savings due to those actions funded by Federally appropriated funds.

Question #12: If a Governor applies some of the Section 155 funds to the Weatherization Assistance Program in a State where Indian tribes receive Federal funds for the program directly from the Federal government rather than from the State, should a portion of those funds designated for the Weatherization Assistance Program be disbursed to the Indian tribes?

Answer #12: In such a State, the Governor is required to do one of two things: either disburse a portion of the escrow funds in the amount calculated according to 10 CFR 440.11(b) to the tribal organization or other entity chosen by DOE under 10 CFR 440.11(d); or insure that the eligible members of Indian tribes in the State receive weatherization assistance in the same manner as other eligible individuals in the State receive such assistance.

[48 FR 6082, Feb. 9, 1983]

RULING 1984-1—RESTITUTIONARY AUTHORITY AVAILABLE TO THE DEPARTMENT OF ENERGY UNDER THE STATUTES AND REGULATIONS IT ADMINISTERS

As the enforcement program under the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. 751 *et seq.*, approaches its conclusion, remedy issues involving transactions that occurred during the period of controls have become more prominent. The Comptroller General of the United States has rendered several opinions construing statutes and regulations administered by the Department of Energy ("DOE") in which he has raised questions about the Department's exercise of its remedial authority. These views have also been presented to the various courts in connec-

tion with remedy-related litigation. The Department has not previously formulated a comprehensive delineation of the remedies authorized by its regulations and the EPAA. DOE has, instead, addressed these matters on a case by case basis. Since certain enforcement matters stemming from the period of controls remain to be concluded, those affected by remedies in such matters would be aided by an authoritative interpretation of the statutes and regulations bearing on this subject.

This ruling sets forth the Department of Energy's interpretation of the scope of its remedial authority under the EPAA and regulations promulgated by the Department and addresses specifically certain opinions that the Comptroller General has offered on this subject.

I. BACKGROUND

During the course of the EPAA enforcement program, DOE has collected hundreds of millions of dollars from firms through orders, settlements and judgments which resolved alleged violations of the petroleum price and allocation regulations. In order to benefit those who were economically injured by the alleged or adjudicated violations, DOE has utilized a number of different restitutionary remedies.

For example, prior to decontrol, Exec. Order 12287, 46 FR 9909 (Jan. 30, 1981), many DOE orders provided refunds to overcharged direct purchasers who were not end users, since under price controls such payments could benefit consumers by reducing the product costs the direct purchasers were permitted to pass on. See generally 10 CFR 212.83(c)(2) (refiner price rule); 10 CFR 212.93(c) (reseller price rule). Since decontrol, refunds to first purchasers that are not end users are rarely ordered because such payments are no longer an effective means of directing disgorged sums to injured downstream customers. Price rollbacks were also rendered ineffective by decontrol since there are no longer regulated prices from which rollbacks can be instituted.

Until recently, DOE's Economic Regulatory Administration ("ERA")

used several different types of remedies in its consent orders. Some consent orders provided for direct disbursement to particular purchasers; some provided for various forms of "indirect restitution" (such as payments to the states and deposits of funds to the United States Treasury), where tracing the effects of overcharges to identifiable injured purchasers was infeasible; and other consent orders provided for distribution by DOE through, *inter alia*, the agency's special refund or "Subpart V" procedures, 10 CFR 205.280-205.288. DOE's current practice is to use Subpart V as the primary vehicle for distributing consent order funds.

The courts, in ordering or affirming a variety of remedies, have almost uniformly observed the great breadth of the statutory concept of restitution and approved DOE's interpretation of its remedial authority. See, e.g., *Getty Oil Company v. DOE*, 569 F. Supp. 1204 (D. Del. 1983), *appealed on other grounds*, No. 3-37 (TECA Oct. 19, 1983); *United States v. Exxon Corp.*, 516 F. Supp. 816 (D.D.C. 1983), *appeal docketed*, No. DC-91 (TECA June 22, 1983); *Pennzoil Company v. DOE*, 4 Energy Mgmt. (CCH) ¶26,415 (D. Del.), *aff'd on other grounds sub nom. Cities Service Company v. DOE*, 715 F.2d 572 (TECA 1983). The Comptroller General of the United States, however, has offered a more narrow view, stating, in four opinions, that DOE's own regulations and the relevant statutes mandate use of Subpart V in each case where the identity of injured purchasers and the amount of their injuries cannot be readily ascertained. See Comp. Gen. decision B-210176, Feb. 7, 1984; 62 Comp. Gen. 379 (1983); Comp. Gen. Opinion B-200170, April 1, 1981; 60 Comp. Gen. 15 (1980).

Under the Legislative Reorganization Act of 1970, 31 U.S.C. 720, the DOE is required to submit a formal response to the latest Comptroller General opinion. Moreover, the Temporary Emergency Court of Appeals has recently expressed an interest in the Comptroller General's February 7, 1984 opinion in one case, *Hodel v. Hunt*, No. 5-101, slip. op. (TECA April 24, 1984), and the Comptroller General's opinions have been presented to

the courts in several other proceedings. Important remedy issues are at stake in these cases, and the courts and the public would be aided by a clear and coherent statement on DOE's remedial authority from DOE, the agency charged with administering and enforcing the relevant statutes and regulations. Under these circumstances, the DOE is issuing this ruling to set forth its interpretation, and to address the Comptroller General's views, concerning the scope of the Department's remedial authority.

For the reasons stated in this ruling, the DOE concludes that the statutes and regulations it administers permit use of the following mechanisms where appropriate to remedy the effects of violations or alleged violations of the price and allocation regulations: payments to direct purchasers and downstream customers; use of the agency's special refund procedures (10 CFR Part 205, Subpart V); payments to the United States Treasury; payments to the states; and such other restitutionary actions as are appropriate in the circumstances of a given matter.

II. DOE'S REGULATIONS ON REMEDIES

The Comptroller General contends that DOE regulations require resort to Subpart V procedures whenever injured persons cannot be readily identified or the extent of their injuries cannot be reasonably determined, and that, under these circumstances, DOE may not enter into consent orders unless the funds disgorged are to be distributed pursuant to Subpart V. B-210176 at 3; 62 Comp. Gen. 379, 385-86; 60 Gen. 15, 25-26; see also B-200170, at 4-5. The Comptroller General is incorrect in his reading of the regulations promulgated by this Department, as the following textual, historical and structural analysis indicates.

DOE has adopted two major regulatory provisions of remedies: the general remedies regulation, 10 CFR 205.199I, and the special refund (or Subpart V) procedures, 10 CFR 205.280 *et seq.* The general remedies regulation specifies a broad and non-exclusive array of remedies DOE may utilize:

A Remedial Order . . . or a Consent Order may require the person to whom it is directed to roll back prices, to make refunds equal to the amount (plus interest) charged in excess of those amounts permitted under DOE regulations, . . . and to take such action as the DOE determines is necessary to eliminate or to compensate for the effects of a violation Such action may include a direction to the person to whom the Order is issued to establish an escrow account or take other measures to make refunds directly to the purchasers of the products involved, notwithstanding the fact that those purchasers obtained such products from an intermediate distributor of such person's products In cases where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination, the DOE may refund the amounts received in such cases directly to the Treasury of the United States on behalf of such purchasers.

10 CFR 205.199I, 44 FR 7922 (Feb. 7, 1979).

This regulation has a long history in the price control programs administered by DOE and its predecessor agencies. In regulations promulgated under the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, the Cost of Living Council provided for administrative remedial orders, which were defined as:

An order requiring a person to cease a violation or to take action to eliminate or to compensate for the effects of a violation, or both, or which imposes other sanctions.

6 CFR 155.81(b); 38 FR 21981, 21985 (Aug. 15, 1973) (emphasis added). DOE and its predecessors continued to construe their remedial authority very broadly in regulations issued under the EPAA. See 10 CFR 205.86, 39 FR 1924 (Jan. 15, 1974); 10 CFR 205.194, 39 FR 32262 (Sept. 5, 1974); 10 CFR 205.195, 40 FR 40141 (Sept. 2, 1975). In a February 1979 amendment to the regulations, DOE specifically recognized that overcharge funds may be paid directly to the United States Treasury where it is infeasible to determine who was injured or in what amount. 10 CFR 205.199I(a), 44 FR 7922 (Feb. 7, 1979).

In February 1979, DOE also promulgated the Subpart V regulations. 10 CFR 205.280 *et seq.* 44 FR 8562 (Feb. 9, 1979). Under these procedures, when

requested to do so by a DOE enforcement official, DOE's Office of Hearings and Appeals ("OHA") may determine an equitable distribution of petroleum violation funds obtained by DOE through a consent order or remedial order. See 10 CFR 205.281, 205.282. After a Subpart V proceeding is initiated, OHA establishes standards for the distribution of refunds to potentially injured purchasers, pursuant to which purchasers may obtain refunds upon filing claims which satisfy OHA's standards. 10 CFR 205.282, 205.284(d). OHA then effects some form of indirect restitution with funds remaining after successful claimants have been paid. 10 CFR 205.287(c).

Under DOE regulations, the decision to initiate Subpart V refund procedures is a matter within the discretion of agency enforcement officials:

At any time after the issuance of the Remedial Order * * * or a Consent Order, the Special Counsel of the Department of Energy, the ERA Office of Enforcement or any other enforcement official of the Department of Energy may file with the Office of Hearings and Appeals a Petition for the Implementation of Special Refund Procedures.

10 CFR 205.281(a) (emphasis added). In contrast to the permissive "may" in § 205.281(a), the regulations use the mandatory "shall" in describing the requirements for the contents of a petition:

The Petition shall state that the person filing it has been unable readily either to identify the persons who are entitled to refunds to be remitted pursuant to a Remedial Order or a Consent Order or to ascertain the amounts of refunds that such persons are entitled to receive. The Petition shall request that the Office of Hearings and Appeals institute appropriate proceedings under this subpart * * *.

10 CFR 205.281(b) (emphasis added). DOE's use of the permissive "may" in § 205.281, juxtaposed with the mandatory "shall," demonstrates that ERA's initiation of Subpart V procedures is discretionary. E.g., *Koch Refining Company v. DOE*, 658 F.2d 799, 803-04 (TECA 1981). The fact that an enforcement official must "request" that OHA entertain a petition also emphasizes the discretionary nature of such a proceeding.

The "purpose and scope" provision of the Subpart V regulations sets forth the appropriate circumstances for use of the Subpart V procedures:

This subpart establishes special procedures pursuant to which refunds may be made to injured persons in order to remedy the effects of a violation of the regulations of the Department of Energy. This subpart shall be applicable to those situations in which the Department of Energy is unable to readily identify persons who are entitled to refunds specified in a Remedial Order * * * or a Consent Order, or to readily ascertain the amounts that such persons are entitled to receive.

10 CFR 205.280 (emphasis added). The Comptroller General has incorrectly concluded that Subpart V is mandatory, because he has misinterpreted the phrase "shall be applicable" in § 205.280 to mean "must be applied" or "must be used" and because he has ignored § 205.281 altogether. Section 205.280, read in conjunction with § 205.281, indicates that an ERA enforcement official has discretion whether to initiate a Subpart V proceeding in "applicable * * * situations," i.e., where he has been unable to readily identify injured persons or to ascertain the extent of their injuries.¹

The Comptroller General's interpretation of Subpart V is also incorrect because it ignores the general remedies regulation, § 205.199I, and the consent order regulation, § 205.199J. These provisions permit DOE in a Consent Order or Remedial Order to

¹The Comptroller General has also placed mistaken reliance on the fact that the final version of § 205.280 does not contain the proposed regulation's prefatory language—"As a general rule." B-200170 at 4 quoting 43 FR 53256, 53257 (Nov. 15, 1978). The above-quoted language was superfluous, as evidenced by the fact that the preamble to the final rule described explicitly the changes to the proposal made by the final rule, but contained no mention at all of this particular deletion. To the extent the deletion has any import, it indicates that Subpart V should be used only where enforcement officials cannot precisely determine the impact of alleged violations on particular purchasers; it does not mean that Subpart V must be used in all cases where it may be used.

"require the person to whom it is directed . . . to make refunds . . . and to take such other actions as the DOE determines is necessary to eliminate or to compensate for the effects of a violation" 10 CFR 205.199I(a) (emphasis added). Moreover, direct refunds to the Treasury are specifically authorized "where purchasers cannot be reasonably identified or paid or where the amount of each purchaser's overcharge is incapable of reasonable determination." *Id.* Finally, the regulations explicitly provide that a "Consent Order . . . may require one or more of the remedies authorized by § 205.199I." 10 CFR 205.199J(b).

Since § 205.199I and § 205.199J authorize Treasury payments and other remedies where injured purchasers cannot be reasonably ascertained, the Comptroller General's interpretation of Subpart V as mandatory is simply at odds with the plain meaning of these other remedial provisions. The Comptroller General's opinion necessarily assumes that DOE repealed the general remedy regulation by implication when the agency promulgated the Subpart V regulations. However, 10 CFR 205.199I had been repromulgated only two days before the Subpart V regulations were issued, (*compare* 10 CFR 205.199I, 44 FR 7922 (Feb. 7, 1979), with 10 CFR 205.280 *et seq.*, 44 FR 8562 (Feb. 9, 1979)), and the general remedies regulation had been revised specifically to acknowledge DOE's authority to remit overcharge funds directly to the U.S. Treasury in appropriate cases. Regulatory constructions requiring implied repeals of agency rules are disfavored. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, the contemporaneous publication of § 205.199I and Subpart V combined with the precatory and broad language of the regulations, and the lack of any regulatory history which suggests that DOE intended to repeal essential provisions of its remedy and consent order regulations when it created Subpart V all lead to the conclusion that Subpart V was promulgated to provide an additional remedial mechanism for DOE enforcement offi-

cials, not an exclusive one.² Thus, consent orders and remedial orders may contain remedies authorized by § 205.199I; use of Subpart V is discretionary. Accordingly, DOE's regulations permit the agency to enter into consent orders and issue remedial orders providing for payments to the Treasury and other forms of indirect restitution in appropriate cases.

III. DOE's STATUTORY AUTHORITY TO EFFECT RESTITUTION

Section 209 of the ESA, 12 U.S.C. 1904 note, as incorporated by Section 5(a)(1) of the EPAA, 15 U.S.C. 754(a)(1), specifically authorizes a court, in a judicial enforcement action, to order a violator to make restitution of overcharges.³ The courts have held

²This conclusion is further supported by ERA's and OHA's continued practice of using Treasury payments and other remedies authorized by § 205.199I after Subpart V was promulgated. *See, e.g., A's Auto Safety Service*, 8 DOE (CCH) ¶ 83,014 (1981), *modified*, Office of Enforcement, 8 DOE (CCH) ¶ 82,594 (1981), *aff'd, sub nom. James Murphy*, 20 FERC ¶ 61,331 (CCH) (1982); *Sun Company, Inc. Consent Order*, 45 FR 80347 (December 4, 1980). Moreover, by delegating to OHA the authority to establish Subpart V, 44 FR 8562, 8563 (Feb. 9, 1979), the Secretary of Energy did not indicate any intent to alter ERA's authority to enter into consent orders. The Comptroller General's interpretation of Subpart V is inconsistent with the division of functions within DOE, whereby ERA prosecutes enforcement actions and enters into consent orders with alleged violators, and OHA acts as the adjudicator *after* ERA files a proposed remedial order or petition. *See* 10 CFR Part 205, Subparts J, O and V. Subpart V did not modify this division of functions. ERA remained free to enter into consent orders incorporating remedies ERA deemed appropriate. Subpart V merely provided ERA with a new remedial option.

³Section 209 provides that: "Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged . . . in any acts or practices constituting a violation of any order or regulation under [the EPAA], such person may request the Attorney General to bring an action in the appropriate district court of the United States. . . . In addition to [granting] injunctive relief, the court may also order res-

Continued

that DOE also has broad remedial authority that includes the ability to require restitution by administrative order. *Sauder v. DOE*, 648 F.2d 1341 (TECA 1981); *Bonray Oil Co. v. DOE*, 601 F.2d 1191 (TECA 1979), *aff'd on basis of district court opinion*, 472 F. Supp. 899 (W.D. Okla. 1978).

The Comptroller General has said that DOE's restitutionary authority restricts DOE to the use of Subpart V whenever the Department cannot readily determine the impact of alleged overcharges on injured parties. The Comptroller General has also asserted that after all claims have been paid in Subpart V, DOE must deposit the remaining funds in the U.S. Treasury, and that any other form of "indirect restitution" is impermissible.

In contrast, the courts have regularly found DOE's remedial powers to be expansive because of the broad enforcement and regulatory authority conferred on the agency and its predecessors. *Sauder v. DOE*, *supra*; *Bonray Oil Co. v. DOE*, *supra*; see also *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972), *cert. denied*, 410 U.S. 928 (1973).⁴ In *Bonray Oil Co. v. DOE*, *supra*, the Temporary Emergency Court of Appeals ("TECA") upheld DOE's authority to order restitution because TECA found restitution to be rationally related to the statutory goal of regulating petroleum prices at "equitable" levels. EPAA § 4(b)(1)(f), 15 U.S.C. 753. The court held that section 209 of the ESA, which authorizes a court to order restitution, was not intended to prevent the agency from requiring that remedy. 472 F. Supp. at 903.⁵ The court concluded that the

scope of DOE's remedial authority must be measured by "the broad purposes of the Congressional mandate in both the ESA and EPAA." 472 F. Supp. at 904.⁶

This expansive interpretation was reaffirmed by TECA in *Sauder v. DOE*, *supra*, where the court expressed its view that "restitution" is:

... A remedy by which a defendant is made to disgorge ill-gotten gains or to restore the status quo or to achieve both objectives. ... There is no indication, however, that [Section 209 of the ESA] attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution.

Sauder v. DOE, *supra*, 648 F.2d at 1348 (emphasis deleted and citations omitted). Relying on *Bonray*, TECA affirmed the agency's remedial determination since it was consistent with the statutory purpose of "set[ting] things right," 648 F.2d at 1348, and by eliminating the need for further complex proceedings, would prevent the Department from being "bogged down in an administrative quagmire." 648 F.2d at 1348, quoting *Tenneco Oil Co. v. FPC*, 442 F.2d 489, 497 (5th Cir. 1971).⁷

The scope of the court's authority to order "restitution" under section 209 of the ESA was subsequently addressed in *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA), *cert. denied*, 103 S. Ct. 172 (1982). In the district court, the Government had sought an order requiring payment of overcharges into escrow for subsequent distribution to injured customers—some dozen of which were regulated utilities that had purchased most of the overpriced oil at issue. Any refund to the utilities

titution of moneys received in violation of any such order or regulation." (Emphasis added).

⁴ As a general matter, administrative agencies have wide discretion in the fashioning of remedies. See, e.g., *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 376 (1973); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965), *reh. denied*, 382 U.S. 1000 (1966).

⁵ Since TECA adopted the district court's opinion as its own, 601 F.2d 1191, citations are to the district court's opinion.

⁶ The DOE's authority to fashion administrative remedies is supported by § 203(a)(1) of the ESA, 12 U.S.C. 1904 note, § 5(b)(5) of the Federal Energy Administration Act, 15 U.S.C. 764, § 4(b)(1)(f) of the EPAA, 15 U.S.C. 753, and § 301 and § 503 of the Department of Energy Organization Act, 42 U.S.C. 7151, 7193.

⁷ In *Sauder*, TECA allowed DOE to collect the full overcharges associated with several leases from the operator, rather than requiring the agency to bring enforcement actions against each of the interest owners.

would ordinarily be passed on to their customers under the usual rules of utility rate regulation. Departing from the remedy urged by the Government, the district court *sua sponie* determined that payment into the miscellaneous receipts of the U.S. Treasury was the more appropriate remedy. *Citronelle-Mobile Gathering, Inc. v. O'Leary*, 499 F. Supp. 871, 886 (S.D. Ala. 1980). Based upon the facts in that case, however, TECA rejected the Treasury payment remedy, and held that the Government must try (as it had sought to do before the district court) to trace the effects of the violations and to compensate the persons who bore the economic harm of the overcharge. TECA left open to DOE the discretion to fashion other remedies, such as payment to the Treasury, if making direct refunds to injured purchasers would be infeasible. 669 F.2d at 722-23; *id.* at 727 (Pointer, J., concurring and dissenting).⁹

In short, DOE must generally attempt to identify and provide refunds to injured purchasers (i.e., provide direct restitution) where it is feasible. When tracing the effects of overcharges to identifiable purchasers is infeasible, however, indirect restitutionary measures are appropriate. *Getty Oil Company v. DOE*, 569 F. Supp. 1204 (D. Del. 1983), *appealed on other grounds*, No. 3-37 (TECA Oct. 19, 1983); *United States v. Exxon Corp.*, 516 F. Supp. 816 (D.D.C. 1983), *appeal docketed*, No. DC-91 (TECA June 22, 1983); *Pennzoil Company v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,415 (D. Del.), *aff'd on other grounds sub nom. Cities Service Company v. DOE*, 715 F.2d 572 (TECA 1983). For example, in *United States v. Exxon Corp.*,

supra, overcharges resulted from crude oil miscertifications that occurred after the commencement of the Entitlements Program in November 1974. These overcharges had been automatically dispersed among all refiners through their participation in the Crude Oil Entitlements Program, 10 CFR 211.67. 561 F. Supp. at 852-53.¹⁰ The court held that the "broad scattering" of the effects of the violations "renders impossible the tracing of the overcharges to their ultimate victims and the calculation of the precise damages suffered by each." *Id.* at 853. See 10 CFR 212.83(c)(2)(iii); 10 CFR 212.93(c)(2); 10 CFR 212.183.

In these circumstances, the court found that restitution to the U.S. Treasury, the indirect restitutionary remedy sought by the DOE, was lawful. However, exercising its own equitable discretion under the ESA and EPAA, the court ordered another form of indirect restitution—payment of the overcharge funds to state governments for energy-related purposes as a means of benefiting the consumers who ultimately had borne the harm of Exxon's overcharges. In another case, restitution of crude oil overcharges to the U.S. Treasury was upheld as a reasonable remedy where DOE, in a remedial order, had found that the impact of the overcharge was untraceable. *Getty Oil Co. v. DOE*, *supra*.¹⁰

⁹The cost-spreading effect of the Entitlements Program is also described in *Union Oil Co. v. DOE*, 688 F.2d 797, 802 (TECA 1982), *cert. denied*, 103 S. Ct. 1186 (1983) and *Cities Service Co. v. FEA*, 529 F.2d 1016 (TECA 1975), *cert. denied*, 426 U.S. 947 (1976).

¹⁰In certain pre-enforcement actions brought against DOE, DOE has sought, and the courts have approved, referral of the issue of disposition of overcharge funds to the agency for determination in the first instance. In *re Department of Energy Stripper Well Regulation Litigation*, 578 F. Supp. 566 (D. Kan. 1983); *Prosper Energy Corp. v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,438 (N.D. Tex. 1983). In granting DOE's motion in the *Stripper Well Litigation*, the court specifically acknowledged that where it is impossible to determine who was injured "the equitable goals of restitution would mandate distribution to either the state governments or the federal government" for energy-related purposes or "a direct refund to the United States [T]reasury." 578 F. Supp. at 584-95.

⁹In *Citronelle*, TECA also held that restitution is the Government's remedy to enforce public rights, not the private rights of purchasers (who may seek damages in private actions brought under section 210 of the ESA):

Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is "a by-product of the agency's effort to re-establish compliance with its regulatory scheme." 669 F.2d and 723 quoting *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 378, 282 (TECA 1980).

Restitution to miscellaneous receipts of the U.S. Treasury has also been upheld where the remedy was part of a DOE settlement agreement. *Pennzoil Company v. DOE*, *supra*. Indeed, in *Pennzoil Company*, the court held that "[t]he sole issue presented is whether the settlement is beyond the agency's authority or otherwise illegal," 4 Energy Mgmt. (CCH) ¶ 26,514 at 29,048, and the Treasury payment remedy was approved because the court concluded that the remedy is "within the authority of the DOE." *Id.*

DOE's remedial discretion is—as it must be—extremely broad in the consent order context because of the very nature of such settlements:

Consent orders are the product of negotiation and compromise in which each party gives up something they might have won in litigation. [A Consent order] makes no attempt to define exactly legal rights and obligations.

Consumer Energy Council v. Duncan, 4 Energy Mgmt. ¶ 26,314 at 28,417 (D.D.C. 1981). DOE settlements, which resolve only matters between DOE and the firm, neither adjudicate a firm's liability nor the impact of alleged violations on purchasers of the firm's products. Moreover, they do not necessarily resolve only discrete issues where the alleged victims can be readily identified. Indeed, many consent orders cover nearly the entire range of an oil company's transactions, involving millions of customers most of whom cannot be readily identified or the amount of their injuries reasonably ascertained. Many of these settlements explicitly state that it is infeasible to identify who was likely to have been injured and in what amount. Further, it is impracticable to provide individual refunds of a few dollars or cents to millions of affected consumers even if tracing and identification theoretically were feasible. In light of these circumstances, it is logical that when DOE exercises its prosecutorial discretion to settle a case instead of litigating it to its conclusion, the agency's remedial discretion is at its apogee. See, e.g., *Pennzoil Company v. DOE*, *supra*; *U.S. Oil Company v. DOE*, 510 F. Supp. 910, 914-15 (E.D. Wis. 1981); see also *Minnesota v.*

Standard Oil Company (Indiana), 516 F. Supp. 682, 692 (D. Minn. 1981). The Comptroller General's opinions, which would require the remedies for every settlement to be adjudicated, are wholly at odds with DOE's broad discretion to settle cases.

As the foregoing discussion shows, DOE's statutes, as judicially construed, permit the agency and the courts to utilize forms of indirect restitution without resort to Subpart V where direct restitution is infeasible. Arguments similar to those made by the Comptroller General have been repeatedly rejected by the courts. See, e.g., *Getty Oil Company v. DOE*, *supra*; *Pennzoil Company v. DOE*, *supra*; *United States v. Exxon Corp.*, *supra*. See also *Kirkpatrick Oil and Gas Co. v. DOE*, 4 Energy Mgmt. (CCH) ¶ 26,400, 28,966 (W.D. Okla. 1982).

The courts have also upheld forms of indirect restitution other than deposits to the U.S. Treasury. See *United States v. Exxon Corp.*, *supra*. Payments to the states and furnishing oil to the Strategic Petroleum Reserve ("SPR") can be proper indirect restitutionary remedies since they provide indirect benefits to the consuming public as would a payment to the general funds of the United States Treasury.

Payments to the Treasury benefit all purchasers by mitigating the need for additional taxes or reductions in government services. Similarly, an "in-kind" payment of crude oil for deposit into the SPR benefits all American consumers by providing a secure source of oil to alleviate any future oil shortages and their resulting price increases.¹¹ Payments to state govern-

¹¹We note that these remedies are lawful where alleged crude oil overcharges were dispersed throughout the American economy. The Comptroller General's criticism of consent orders containing SPR remedies (62 Comp. Gen. at 388) is apparently based on a misunderstanding of the nature of the alleged violations which were settled and the effect of DOE's Entitlements Program and pass-through regulations in dispersing the alleged overcharges. In this regard, the Comptroller General believed that in *Amoco Brand Committee*, 10 DOE ¶ 82,556

Continued

ments whose citizens have borne the harm of alleged violations benefit the consumers within these states.¹²

(1983), the Office of Hearings and Appeals had directed refunds to purchasers claiming injuries attributable to alleged crude oil violations. See 62 Comp. Gen. at 390-91. This is simply incorrect.

¹²In section 155 of Pub. L. No. 97-377, 96 Stat. 1830 (1982), commonly referred to as the Warner Amendment to the Further Continuing Appropriations Act, 1983, Congress mandated a one-time distribution of up to \$200 million of petroleum violation funds in DOE escrow accounts to states for energy-related purposes. DOE's remedial authority under the ESA and EPAA is not even referred to in the Warner Amendment and is thus unaffected by it. The Comptroller General, however, relying on a statement by Congressman Dingell that the Amendment "is a one-time provision" (128 Cong. Rec. H. 10435 (daily ed. Dec. 20, 1982)), has stated that the passage of the Amendment reflects Congress' view that direct distribution to the states is unauthorized under the ESA and EPAA. 62 Comp. Gen. at 384. The Comptroller General is mistaken since the Warner Amendment is neutral on this point and statements by a Congressman concerning the meaning of previous statutory enactments (here, the ESA and EPAA) years after their passage can be given little, if any, weight. E.g., *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978). In any event, the legislative history at least equally supports the view that distribution to the states is a permissible form of restitution. As was stated in the Senate debate:

The conferees did not specifically address the disbursement of other funds collected as a result of overcharges. The proposal for distributing overcharge funds adopted by the Senate reflects the approach the DOE should be following under existing law, and in fact DOE has in part been proceeding in this fashion. It is the most appropriate method of providing restitution for the injuries suffered by the consumer. I hope that the action taken by the Senate and the conferees will provide a clear indication that the Department should proceed expeditiously to assure the appropriate disposition of all the overcharges previously or hereafter collected.

128 Cong. Rec. S. 15701 (daily ed. Dec. 20, 1982) (remarks of Sen. Kennedy) (emphasis added). At most, the legislative history of the Warner amendment indicates that members of each House expressed an opposing post-enactment interpretation of the Department's ESA and EPAA remedial authority, giving added weight to the Supreme Court's admonitions that such post-enactment views are unreliable indicators of the

Where the effects of alleged violations are less than nationwide, payment to the affected states permits a more focused remedial action corresponding to the region that experienced the economic effects of the violations.¹³

The Comptroller General apparently considers that any payment which are made to states must be legally restricted to energy-related purposes under plans approved by DOE. 62 Comp. Gen. at 389. This interpretation is unsupported by any statutory or regulatory provision. As a means of indirect restitution, unrestricted payments to states can benefit state consumers, just as unrestricted payments to the U.S. Treasury will benefit consumers nationwide. While consumers may benefit where funds are to be used for energy assistance and conser-

meaning of statutes. See, e.g., *Southeastern Community College v. Davis*, 442 U.S. 397, 411-12 n.11 (1979); *Quern v. Mandley*, *supra*.

¹³Accordingly, we do not understand the Comptroller General's legal basis for his view that all funds which cannot be distributed to individually harmed purchasers must generally be refunded to the U.S. Treasury. See 62 Comp. Gen. at 391-92. In an earlier opinion, the Comptroller General had said that funds not distributed to injured purchasers are "moneys received for the use of the United States" and thus must be covered into the U.S. Treasury as miscellaneous receipts under 31 U.S.C. 484, *recodified and amended as* 31 U.S.C. 3302 (1983). 60 Comp. Gen. 15, 26-27 (1980). This assertion appears to have been abandoned and, in any event, is incorrect since DOE restitutionary funds are received for the benefit of injured purchasers; these monies are not the funds of the U.S. Government *qua* Government. Indeed, the Department of the Treasury has concluded that it "entertain[s] no doubt that [the funds collected by DOE] are not subject to the deposit requirement of 31 U.S.C. 484." *Enforcement of Major Refiner Cases: Getty Oil and Other Settlements: Hearing Before the Subcommittee on Energy and Power, Committee on Interstate and Foreign Commerce, House of Representatives*, 96th Cong., 2d Sess. 748, 748-49 (1980) (letter from Gene Godley, Assistant Secretary of the Treasury, to Congressman John D. Dingell). Courts have reached the same conclusion in similar contexts. See, e.g., *Emery v. United States*, 186 F.2d 900, 902 (9th Cir.), *cert. denied*, 341 U.S. 925 (1951); *Varney v. Warhime*, 147 F.2d 238, 245 (6th Cir.), *cert. denied*, 325 U.S. 882 (1945).

vation programs, such restrictions are not required. The harm was monetary; the benefit can be monetary.

IV. THE WEIGHT TO BE ACCORDED THE COMPTROLLER GENERAL'S OPINIONS

An agency's interpretation of its own regulations and enabling statutes is entitled to great deference from the courts. *E.g., Udall v. Tallman*, (TECA 1975). In contrast, no such deference is owed to the Comptroller General's opinions concerning another agency's statutes and regulations in which the Comptroller General has no special expertise. See, *e.g., Greene County Planning Board v. FPC*, 559 F.2d 1227, 1238-40 (2d Cir. 1977) (en banc); *Inner City Broadcasting Corp. v. Cardenas*, 554 F. Supp. 42, 49-50 (D.D.C. 1982). See also *NLRB v. Bildisco and Bildisco*, 104 U.S.L.W. 1188, 1198 n. 9 (Feb. 22, 1984). As one court has held in refusing to give weight to a Comptroller General opinion:

[N]one of the factors weighing in favor of deference is presented. The GAO [General Accounting Office] possesses no technical expertise with respect to SBA [Small Business Administration] operations, the Comptroller General's decision came long after the passage of the 1972 amendment to the Small Business Act of 1958 at issue, and it reversed prior SBA practice while citing nothing in the legislative history to support its conclusions.

In interpreting this statute, this court . . . shall do so unfettered by the prior construction of the Comptroller General.

Inner City Broadcasting Corp. v. Cardenas, supra, 554 F. Supp. at 49-50 (footnote omitted).¹⁴ Here, the DOE's

¹⁴In *Greene County Planning Board*, relied on by the *Inner City* court, the Court of Appeals for the Second Circuit affirmed en banc a Federal Power Commission interpretation of the Federal Power Act where the Comptroller General had issued an opposing opinion. The Court held that the FPC's "interpretation of the Federal Power Act by the agency charged with its administration is entitled to great deference from this Court," 559 F.2d at 1239 n.2, and that judicial decisions interpreting statutes and regulations are controlling vis-à-vis Comptroller General opinions. *Id.* at 1238-39; see also *Alexander v. FERC*, 609 F.2d 543, 548

remedial authority in resolving alleged oil pricing violations is predicated solely on those statutes (such as the ESA and EPAA) which the Department has been charged with administering, as well as regulations promulgated by the agency (and its predecessors) pursuant to those statutes. Moreover, the DOE, not the Comptroller General, has the responsibility and corresponding expertise for administering the energy regulatory programs; and the Comptroller General's views conflict with the meaning of the statutes and regulations at issue, as well as the relevant judicial decisions and longstanding agency interpretations and practices. In this context, we conclude that the Comptroller General's opinions addressed here concerning the meaning and effect of the statutory regulatory provisions governing the Department's remedial authority are not entitled to any deference and are incorrect on their merits.

V. CONCLUSION

The scope of DOE's restitutionary authority is measured by the broad purposes of the ESA and EPAA. Pursuant to these statutes, DOE must generally attempt to identify and provide refunds to injured purchasers (i.e., provide direct restitution) where it is feasible. Notwithstanding the Comptroller General's opinions, DOE may also employ various forms of indirect restitution, including refunds to the U.S. Treasury and payments to

(D.C. Cir. 1979). Moreover, as the *Inner City* court subsequently noted, "the majority in *Greene County Planning Board* declined to give the Comptroller General's opinion even the modicum of deference courts give an enforcing agency's statutory interpretations, as three dissenting judges urged it to do." 554 F. Supp. at 50 n. 8. Indeed, the Comptroller General himself has stated that he is bound by an agency's interpretation of its own statutes and regulations as long as it is reasonable:

[W]here the agency interpretation is merely one of several reasonable alternatives, it must stand even though it may not appear [to the Comptroller General] as reasonable as some other.

53 Comp. Gen. 143, 145 (1973); see also 61 Comp. Gen. 403, 407 (1982); 57 Comp. Gen. 347, 350 (1978).

state governments, where DOE enforcement officials determine it is infeasible to trace the impact of violations to particular purchasers. DOE's current practice of reliance on Subpart V proceedings to inquire into the impact of violations is not required by the regulations or the statutes DOE administers, but is within DOE's discretion under the regulations promulgated by this Department.

[49 FR 22064, May 25, 1984]

APPENDIX A—ALPHABETICAL LISTING OF INTERPRETATIONS ISSUED THROUGH DECEMBER 31, 1979

Issued to and Interpretation

- Agents Alliance, Inc.—1975-17
- Air-Conditioning and Refrigeration Institute—1978-26
- Alaska, State of—1977-7
- Alaska Petrochemical Co.—1978-1
- Albina Fuel Co.—1975-74
- Allied Chemical Corp.—1978-3, 1980-26
- American Petrofina, Inc.—1978-31
- American Red Cross—1980-32
- AMP, Inc.—1980-2
- Amoco Chemicals Corp., Inc.—1978-49
- Amoco Oil Co. (Indiana)—1974-16, 1978-7, 1978-14
- Apco Oil Corp. (rescinded)—1978-51
- Arizona Fuels Corp.—1979-18
- Atlantic Richfield Co.—1974-8, 1978-4, 1977-13, 1977-30, 1978-13, 1978-36, 1978-54, 1978-61
- Atlas Aircraft Corp.—1974-15
- Babcock and Wilcox Co.—1975-25
- Baker Industries, Inc.—1980-8
- Ball Marketing Enterprise, et al.—1977-18
- Baltimore Gas & Electric Co.—1975-34
- Barber Oil Corp.—1980-22
- Basin, Inc.—1978-25, 1980-6
- Beacon Oil Co.—1977-23, 1977-24
- Berry Holding Co., et al.—1975-43
- Beukema Petroleum Co.—1975-73
- Blue Blaze Gas Co., Inc.—1979-6
- Body Beautiful Car Wash—1975-57
- Boron Oil Co.—1975-62
- Boston Gas Co.—1976-19
- Boston Housing Authority—1975-54
- Brocato, Charles P.—1979-12
- Bronson, William S.—1975-67
- California, State of—1977-14
- Callahan Oil Co.—1976-25
- Calumet Industries, Inc.—1975-11
- Campbell Oil Co., Inc.—1975-63
- Can Manufacturers Institute—1975-14
- Carter, Carl, Agency, Inc.—1975-67
- Castor, Joseph L.—1975-72
- Celanese Corp.—1974-17
- Champlin Petroleum Co.—1976-22
- Charter Oil Co.—1974-6, 1980-29
- Chase, Wilson A.—1979-23
- Cheker Oil Co.—1975-6
- Chevron U.S.A. Inc.—1980-10
- Cities Services Oil Co.—1976-10, 1980-12
- City of Long Beach, Calif.—1977-2
- Clark Oil & Refining Corp.—1977-25
- Collier & Collier, et al.—1978-20
- Colt, Mack C., Inc.—1978-56
- Columbia City Blue Flame—1979-6
- Commonwealth Oil Refining Co., Inc.—1977-45
- Concord Oil Co., Inc.—1980-19
- Consolidated Paper, Inc.—1975-23
- Consumers Power Co.—1979-26
- Continental Airlines—1975-8
- Continental Oil Co.—1974-26, 1975-30, 1975-31, 1978-29, 1978-44
- Cook & Cooley, Inc.—1975-50, 1977-32
- Crown Central Petroleum Corp.—1978-39, 1980-16
- Crystal Oil Co.—1979-14
- Cyr Oil Co.—1975-69
- Damson Oil Corp.—1977-38
- Danielson, E. L.—1976-70
- Day and Zimmerman, Inc.—1975-56
- DeBlois Oil Co.—1975-66
- DeLozier Chevron Station—1980-34
- Department of Army and Air Force—1976-14
- Department of Defense—1974-27
- Department of the Navy—1975-15
- Derby Refining Co.—1975-64
- Deshler Blue Flame, Inc.—1979-6
- Devon Corp.—1979-3
- Diversified Chemicals & Propellants Co.—1976-24
- Dollar Rent-a-Car Systems—1975-65
- Dyer Oil Service—1975-67
- Eason Oil Co.—1979-3
- East Oil, Inc.—1975-51
- El Paso Natural Gas Co.—1978-32
- Elkins, Campbell H. and El Ran, Inc. (modified)—1978-58M
- Empire Gas Corp.—1976-6
- England, C. R., Oil & Gas Properties—1977-33
- Enterprise Products Co.—1975-3
- Estron Oil Corp., et al.—1974-12
- Ethyl Corp.—1979-15
- Eugene Water & Electric Board—1980-33
- Expo Car Wash, Inc.—1974-29
- Exxon Corp.—1974-14, 1977-10, 1977-52, 1980-3
- Farmland Industries, Inc.—1975-37
- Florida Power & Light Co.—1979-9
- Flying Tiger Line, Inc.—1974-21
- F. M. Brown's Sons, Inc.—1980-4
- Ford Motor Co.—1976-21
- Fresh, R. C. et al.—1977-8
- Gas Club, Ltd.—1975-49
- General American Oil Co. of Texas—1979-19
- Getty Oil Co.—1978-40, 1980-3
- Golden Oil Co.—1975-67
- Good Hope Refineries, Inc.—1978-47
- Gould, John Jr.—1979-1
- Gravcap, Inc.—1978-21

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- Greenbelt Consumer Services, Inc.—1974-7
- Greene Bros. LP Gas and Oil Co.—1974-5
- Grosch Blue Flame—1979-6
- Guam Oil & Refining Co.—1976-22, 1977-5, 1977-36
- Gulf Companies, The—1980-18
- Gulf Oil Corp.—1977-44, 1978-48, 1978-50, 1978-57, 1979-7, 1980-21
- Hamilton Brothers Oil Co.—1974-3
- Harrison, Charles—1975-67
- Hattenhauer, John Douglas—1977-20
- Hauer, James—1975-67
- Hawaiian Independent Refinery, Inc.—1978-55
- Hicks Oil Co.—1977-9
- Hillsdale Blue Flame—1979-6
- HNG Petrochemicals Inc.—1978-16, 1978-62
- Hunt Oil Co.—1980-17
- Husky Oil Co.—1977-15
- Idaho Transportation Department—1975-52
- Independent Drivers Organization—1975-53
- Independent Oil Compounders Assn.—1977-50, 1978-33
- Indiana Farm Bureau Cooperative Association, Inc.—1979-21
- Inxco Oil Co.—1976-5
- Intenco, Inc., and Houston Carbon Co., Ltd.—1978-28
- Jackson, Darrell—1974-22
- Japanese Air Lines Co. Ltd.—1975-40
- Jewell Oil Co., Inc.—1978-23
- Johnson, A. & Co.—1975-24
- Juti Enterprises, Inc.—1980-13
- J & W Refining Inc.—1975-45
- Kadane, G. E. & Sons—1975-29
- Kansas-Nebraska Natural Gas Co., Inc.—1978-41
- K.C.H. Flying Service, Inc.—1978-13
- Kellermeyer's Inc.—1977-39
- Koch Oil Co.—1977-49
- Kramer Service Center, Inc.—1975-59
- Krenik Distributors, Inc.—1980-24
- Latimer, D. C.—1976-16
- Lido Co. of New England—1978-25
- LIG California, Inc.—1979-16
- Liquid Waste Disposal Co.—1974-11
- Longview Refining Co.—1975-12
- Madison Blue Flame—1979-6
- Manley, John D. III—1978-15
- MAPCO, Inc., et al.—1978-63
- Markle Blue Flame—1979-6
- Martin Exploration Co.—1978-27
- Mason, Robert A.—1980-25
- McCulloch Gas Processing Corp.—1974-13, 1977-3
- McNair, Charles W.—1977-40
- Meridian Oil Corp.—1977-46
- Mid-State Oil Co., Inc.—1975-88
- Midwest Oil Co.—1978-33
- Mitchell Energy Corp.—1980-23
- Mobil Oil Corp.—1976-9, 1977-16, 1977-28, 1977-31, 1977-34, 1978-8, 1978-48, 1978-53, 1979-7, 1979-11, 1980-5
- Mobley Oil Co.—1978-6
- Monsanto Co.—1975-2, 1979-22
- Moore-McCormack Resources, Inc.—1975-44
- Murphy Oil Corp.—1975-16
- National Airlines, Inc.—1977-11
- National Association of Texaco Consignees, Inc.—1975-19
- National Convenience Stores, Inc.—1974-25, 1976-11
- National Cooperative Refinery Association—1978-52
- National Institute of Infant Services—1975-39
- National Life and Accident Insurance Co.—1974-24
- National Pest Control Association, Inc.—1980-35
- National Soft Drink Association—1979-24
- Navajo Refining Co.—1977-26
- Nelson Oil Co.—1977-41, 1978-24
- New Mexico, State of—1980-9
- North Manchester Blue Flame—1979-6
- North Webster Blue Flame—1979-6
- Northeast Petroleum Corp.—1975-22
- Northern Natural Gas Co., et al.—1978-63
- Oil Transit Corp.—1977-35
- Oregon Department of Transportation—1975-18
- Owaley, J. M.—1977-27
- Pacemaster, Inc.—1975-47
- Pacific Lighting Exploration Co.—1975-27
- Paine, Joseph J. C. & Associates—1977-37
- Pan American World Airways, Inc.—1975-26
- Pasco, Inc.—1975-7, 1978-38
- Peerless Distributing Co.—1977-29
- Pennzoli Co.—1978-11
- Pennzoli Offshore Gas Operators, Inc.—1978-17
- Permian Corp.—1978-12, 1978-45
- Peters, B. R. Inc.—1975-38
- Petrolane, Inc.—1976-18
- Petroleum, Inc.—1975-42
- Petro US, Inc.—1974-20
- Phillips Petroleum Co.—1975-5, 1977-12
- Placid Oil Co. (modified)—1979-2M
- Pleasant Street Co.—1975-55
- Portable Sanitation Association—1974-1
- Price, W. H.—1980-14
- Pru Lease, Inc.—1974-23
- Public Service Commission of Delaware—1978-4
- Pyrofax Gas Corp.—1977-4
- Remington Blue Flame—1979-6
- Rookwood Oil Terminals, Inc.—1978-8
- Rotary Gasoline Dealers—1975-48
- Rounds, Don M. Co.—1975-42
- Rustex Oil, Inc.—1978-5
- Ryall, E. E.—1978-59
- Saber Petroleum Corp.—1976-7
- Scarpulla, Frances O., Esq.—1977-17
- Sea Horse Marine, Inc.—1977-22
- Semarch California, Inc.—1979-16
- Shell Oil Co.—1975-4, 1975-21, 1976-15, 1978-2, 1978-42, 1978-50, 1979-20, 1980-7, 1980-15
- Shields, Herman P.—1975-67
- Signal Oil and Gas Co.—1974-4
- Signore, Anna, Estate of—1975-58
- Simmons Oil Corp.—1975-61

Sinclair Oil Corp.—1979-5
 Skelly Oil Co.—1975-1
 Sky Harbor Air Services, Inc.—1974-15
 Sohio—1976-17
 Sohio-BP Oil, Inc.—1976-3
 Solar Turbines International—1979-13
 Sound Refining Inc.—1974-2
 Southern Gulf Oil Distributors Association, Inc.—1975-13
 Southern Union Gas Co.—1978-34
 Spartan Petroleum Co.—1978-30
 Standard Oil Co. (Indiana)—1974-10, 1977-43, 1978-50, 1979-4, 1980-3, 1980-11, 1980-27
 Sterling Stations, Inc.—1977-19
 Stevenson, Warren—1978-46
 Suburban Propane Gas Corp.—1977-21
 Sulphur Springs L. P. Gas, Inc.—1979-6
 Sun Gas Co.—1978-37
 Sun Oil Co.—1976-12, 1978-19, 1980-31
 Sundance Oil Co.—1977-1
 Sunmark Industries—1980-30
 Swann Oil, Inc.—1974-19
 System Fuels, Inc.—1975-16
 Tesoro Petroleum Corp.—1975-32, 1978-10
 Tesoro-Alaskan Petroleum Corp.—1974-21
 Texaco, Inc. (modified)—1977-42M
 Texas City Refining, Inc.—1977-6
 Thurman, F. D.—1975-70
 Time Oil Co.—1979-10
 Tinnin, G. W.—1978-60
 Trans World Airlines—1975-46
 Transcontinental Gas Pipeline Corp.—1978-18
 Tristate Oil & Asphalt Sales, Inc.—1978-22
 True Oil Purchasing Co.—1978-43
 Twin Montana, Inc.—1975-10
 U.S.A. Petroleum Corp.—1976-20
 U.S. Oil and Refining Co.—1975-41, 1979-8
 Union Oil Co. of Calif.—1977-53
 United Oil Co., Inc.—1974-28
 United Refining Co.—1976-1
 United States Marine Corps—1975-20
 United States Steel Corp.—1980-20
 UPG, Inc. (modified)—1978-35M
 Vickers Petroleum Corp.—1977-47
 Wallace, Gordon H.—1975-71
 Wanda Petroleum Co.—1976-2
 Ward, L. O.—1977-48, 1979-17
 Webber Tanks, Inc.—1977-51
 Weinert Estate, H. H.—1978-9
 WESCO Corp.—1975-60
 West Side Distributing Co.—1980-1
 Whirlpool Corp.—1980-28
 Wickland Inc.—1975-35
 Williams Energy Co.—1974-18
 Winamac Blue Flame—1979-6
 Wooten, Norman, Inc.—1975-9
 Yellow Cab Co. of Philadelphia—1978-57
 [45 FR 74422, Nov. 7, 1980]

APPENDIX B—CHRONOLOGICAL INDEX OF RULINGS BY NUMBER AND TITLE ISSUED THROUGH DECEMBER 31, 1979

Ruling and Title

1974-1, Prices for Base Period Purchasers
 1974-2, Redirected Sales Pricing
 1974-3, Supplier/Purchaser Relationships Under the Petroleum Allocation Regulations
 1974-4, Impact of State Tax on Gross Sales
 1974-5, Determination of Propane Prices Under the Petroleum Allocation Regulations
 1974-6, Discrimination Among Purchasers of Allocated Products
 1974-7, Truck Stop Leases
 1974-8, Allocation of Non-Bonded Aviation Fuel
 1974-9, Minimum Rent Provisions in Leases of Real Property in the Retailing of Gasoline
 1974-10, Changes in Credit Terms
 1974-11, Current Free Market Price for "New" and "Released" Crude Oil Under the Price Rule of § 212.72
 1974-12, Unrecouped Increased Product Costs Where Prices Charged Under Fixed-Price Contracts Are Less Than The Lawful Base Price
 1974-13, Motor Gasoline Retail Sales Outlets
 1974-14, Base Rent Regulations
 1974-15, Portable Sanitation Industry
 1974-16, Allowable Use of Multiple Allocation Fractions
 1974-17, Base Price Computation
 1974-18, Discounted May 15, 1973 Price to a Class of Purchaser
 1974-19, Competitive Bids: Supplier/Purchaser Relationships
 1974-20, Additional Use of Property Used in the Retailing of Gasoline
 1974-21, Exchanges of Refined Petroleum Products for Crude Oil
 1974-22, Supplier/Purchaser Relationships Applying to the Department of the Interior
 1974-23, Car Wash Sales of Gasoline
 1974-24, Truck Stop Leases
 1974-25, Spot Sales Under Part 211
 1974-26, Application of the Refiner's Cost Formula of § 212.83(c) to Refiners Required to Sell Crude Oil Under the Allocation Program
 1974-27, Allocation of Refiner's Increased Product Costs to Sales Volume
 1974-28, Inapplicability of the "Stripper Well Lease" Exemption of 10 CFR § 210.32 to Gas Wells
 1974-29, Production Wells for Purposes of the "Stripper Well Lease" Exemption of 10 CFR § 210.32

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- 1974-30, Measurement of the Number of Barrels of Production from an Oil Well for the "Stripper Well Lease". Exemption of 10 CFR § 210.32
- 1975-1, Transportation Costs
- 1975-2, Application of the Term "Class of Purchaser" under FEA Petroleum Price Regulations
- 1975-3, Prospective Increases in Rent for Real Property Used in the Retailing of Gasoline
- 1975-4, Storage Tank Rentals
- 1975-5, Treatment of Confidential Information Received by FEA Pursuant to Oil and Gas Reserves Survey (Form FEA P-301-S-0)
- 1975-6, Pricing of Natural Gas Liquid Products Prior to January 1, 1975
- 1975-7, Export Sales
- 1975-8, Qualification of Certain Consignees as Wholesale Purchaser-Resellers
- 1975-9, Storage Costs
- 1975-10, Transportation Costs Where Transportation is Provided by the Firm Concerned
- 1975-11, Rentals of New, Higher Cost Storage Tanks
- 1975-12, Calculation of "Average Daily Production" for Purposes of the Stripper Well Lease Exemption of 10 CFR 210.32 Where Production Has Been Curtailed
- 1975-13, Early Payment Percentage Discounts
- 1975-14, Prices Charged to Reflect Non-Product Cost Increases Incurred by Resellers, Reseller-Retailers and Retailers
- 1975-15, Definition of "Property" for Purposes of Computing Base Production Control Level Pursuant to 10 CFR 212.72
- 1975-16, Carry-Forward of the Amount by Which Prices Charged are Less than the Price Increase Permitted to Reflect Increased Non-Product Costs by Resellers, Reseller-Retailers, and Retailers
- 1975-17, Application of FEA's Mandatory Petroleum Price and Allocation Regulations During September 1975
- 1975-18, Computation of Increased Cost of Natural Gas Shrinkage

- 1976-1, Allocations with Respect to Newly Constructed or Purchased Refineries Under Crude Oil Buy/Sell Program
- 1976-2, Production of "New" Crude Oil Due to Extra Day in February, 1976; Effect on Cumulative Deficiency Requirement and BPCL Adjustments
- 1976-3, Interpretation of Naval Petroleum Reserves Production Act of 1976
- 1976-4, Inapplicability of Mandatory Petroleum Allocation and Price Regulations to Synthetic Fuels Processed from Oil Shale, Tar Sands, and Coal
- 1976-5, Retail Sales Outlet Operator's Entitlement to Motor Gasoline
- 1976-6, Record Keeping Requirements
- 1977-1, Clarifications to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil
- 1977-2, Further Clarifications to Mandatory Petroleum Price Regulations Applicable to Domestic Crude Oil
- 1977-3, Cargo Sales
- 1977-4, Timing of Landed Cost for Inter-affiliate Transactions
- 1977-5, Application of the Definition of "Transaction" for Purposes of Computing Weighted Average May 15, 1973, Prices
- 1977-6, Applicability of the Stripper Well Property Exemption to Properties that Produce Both Crude Oil and Condensate Recovered in Non-Associated Production
- 1977-7, Post-September 1, 1976 Treatment of Separate Reservoirs as Stripper Well Properties
- 1977-8, Termination of Crude Oil Supplier/Purchaser Relationships by a Producer
- 1979-1, Application of "Transaction" Definition to Variable-Price Contracts
- 1979-2, Redirection of Motor Gasoline
- 1980-1, Kerosene-fueled Water Heaters
- 1980-2, Allocation of Motor Gasoline at Retail Sales Outlets
- 1980-3, Clarifications to the Newly Discovered Crude Oil Ceiling Price Rule
- 1980-4, Clarification of the Definition of "Operational"

[45 FR 74424, Nov. 7, 1980]

APPENDIX C—SUBJECT INDEX FOR INTERPRETATIONS AND RULINGS ISSUED THROUGH DECEMBER 31, 1979

Subject	Interpretations	Rulings
Accounting practices	1978-52	
Acquisition rule	1975-9; 1978-18; 1980-30	
Affiliated entities, def.	1978-4	
Agricultural production, def.	1979-24; 1980-4, -35	
Allocation entitlement	1974-17; 1975-37; 1978-10; 1980-11, -24	
Allocation entitlement, method of	1974-19	
Allocation entitlement, transfer of	1974-29; 1975-35; 1977-47; 1979-23; 1980-16, -18, -20	1974-13
Allocation fraction	1980-21	1974-16

APPENDIX C—SUBJECT INDEX FOR INTERPRETATIONS AND RULINGS ISSUED THROUGH DECEMBER 31, 1979—Continued

Subject	Interpretations	Rulings
Allocation levels	1974-1; 1979: -8, -13, -15, -24; 1980: -4, -8, -32, -35.	
Assignment by agency	1976-25	
Average daily production, def.	1974-22; 1975: -41, -43	
Average monthly purchases, def.	1980-34	
Aviation fuel, allocation of		1974-8.
Base period supplier	1974: -6, -15; 1975: -31, -73; 1980-1	
Base period supplier, designation of	1974-21	
Base period supply obligations	1974-25; 1976-11; 1977: -19, -20	1974-25.
Base period use, adjustments to	1977: -28, -32; 1978-24; 1979-20; 1980-34.	1974-13.
Base period volume	1975-50; 1980-11	
Base price	1975-8	1974: -2, -17, -18, -26; 1975-6; 1977-5.
BPCL	1975-27; 1976-16; 1977: -12, -37; 1978-8; 1979-1, -1; 1977-2; 1980: -17, -25.	1975-15; 1976-2.
Base rent rule	1974: -24, -28	1974: -7, -9, -14, -20, -24; 1975-3.
Base rent rule, lease termination	1975-58	
Benzene and toluene, special rules for	1976-10	
Blending costs, retailer	1975-74	
Bonded fuel, def.	1975: -8, -26, -46	
Bonded fuel exemption	1975: -8, -26, -46	
Borrow-pay back rule	1975-30	
Burning of petroleum products by power generators	1975-25	
C, subpart: part 212	1979-21; 1980-29	
California lower tier crude oil	1978-48	
Certification	1977: -33, -52; 1978: -12, -24; 1979-19; 1980-14.	
Class of purchaser	1974-7; 1975: -5, -6, -22, -31, -47, -63; 1976: -1, -6, -7, -20; 1977: -10, -11; 1978-44; 1980-16.	1974: -1, -2, -17, -18; 1975-2.
Commission agents or consignees	1974-10; 1975: -13, -17, -19, -31, -33, -48; 1977: -8, -17, -27, -30, 40; 1978: -59, -60; 1979-6; 1980: -1, -18, -24.	1975-8.
Competitive bids	1975-56	1974-19.
Condensate, def.	1978-35M; 1979: -4, -26; 1980-31.	
Confidential information		1975-5.
Cost of crude oil, def.	1976-4	
Covered products, def.	1978-24; 1977: -9, -50; 1978: -11, -28, -54.	
Crude oil buy/sell program	1977-34; 1978-39; 1979-8	1974-26; 1976-1.
Crude oil, def.	1975-29; 1977: -3, -22, -31; 1979: -3, -4; 1980-28.	
Crude oil resales	1978-25	
Crude oil runs to stills, def.	1978-31; 1979-26; 1980-27	
Crude oil ceiling price rules, long-term contracts (premiums)	1977: -2, -14; 1978-21	
Current cumulative deficiency	1974-8; 1976-16	1976-2.
Customary discounts	1975-66	1974: -18, -23; 1975-13.
Customary price differential	1978-44; 1980-16	
D, subpart: part 212	1974-20; 1975-29; 1977-3; 1978-21; 1979: -17, -21; 1980: -7, -9, -17, -20, -22, -23, -25.	
December 1 rule	1974: -2, -3, -4; 1975-45; 1976: -15, -20; 1977: -7, -13, -14, -15, -42M; 1978: -1, -45.	1974: -11, -21, -22; 1977-8.
Disallowance of costs	1979-11	
E, subpart: part 212	1978: -16, -29, -61; 1979: -3, -11; 1980: -3, -12, -15, -16, -19, -29.	
EPAA supercession of other Federal laws	1974-27; 1975-15	
Emergency services, def.	1980: -8, -32	
End-user, def.	1980-2, -35	
Energy conservation program:		
Room air conditioners	1978-26	
Clothes washers	1980-28	
Emergency building temperature restrictions	1980-33	

APPENDIX C—SUBJECT INDEX FOR INTERPRETATIONS AND RULINGS ISSUED THROUGH DECEMBER 31, 1979—Continued

Subject	Interpretations	Rulings
Kerosene-fueled water heaters		1980-2.
Operational, def		1980-4.
Solar energy exemption	1980-33	
Energy production, def	1979: -9, -13, -15.	
Entitlements program	1975-21; 1976-22; 1977: -5, -22, -31, -45; 1978: -31, -42, -48; 1979: -4, -18, -26; 1980: -10, -27, -29.	1976-3.
Equal application rule	1975-5; 1976-17; 1978: -36, -53; 1980-15.	
Exchange agreements	1977: -5, -36; 1978-10	
Export sales, def	1977-16	1974-21.
Export sales deduction	1975-21; 1977: -16, -30, -36, -44; 1978: -10, -42, -54, -55; 1980-10.	
Export sales exemption	1977-16, -21, -44; 1978: -10, -42.	1975-7.
F, subpart; part 212	1976-6; 1977-3; 1978: -4, -63; 1979-23	1977-3.
Federal preemption of State laws	1978-4	
Field	1977-43	
Firm, def	1975: -3, -32, -52, -55, -60; 1978: -3, -8, 1977: -6, -18, -29; 1978: -62, -63; 1979: -3, -16, -22; 1980-2.	
1st sale, def	1976-4; 1977-38; 1978: -21, -63; 1979-14; 1980: -22, -23.	
5 percent rule	1974-14; 1977: -6, -24	
Fuel use act regulations:		
Alternate fuel, def	1980-5	
Refinery, def	1980-5	
Waste gas	1980-5	
G, subpart; part 212	1974: -24, -28; 1975-69	1974-24; 1975-3.
Gas plant, def	1980-26	
Gasoline reseller—going out of business	1980-24	
Guam	1975: -8, -26, -46.	
Import exemption	1975-24	
Inventories	1975-23	
K, subpart; part 212	1978: -2, -5; 1977-3; 1978: -16, -27, -29, -32, -34, -35M, -37, -41, -61, -62, -63; 1979: -2M, -3, -14; 1980: -26, -31.	1977-3. 1975: -6, -18.
Landed costs	1980-12	
Lease condensate, def	1979-4	1977-4.
Motor gasoline, def	1978-47	
Naphtha, def	1978-47	
Naphtha allocation	1975-44	
Naval petroleum reserves, crude oil price exemption.		1976-3.
Natural gas shrinkage	1978: -27, -34, -37, -41, -61, -62; 1979: -2M, -3.	
Natural gas liquids, def	1978: -32, -35M; 1980-31	
Natural gas liquid products	1974-13; 1977-3; 1978: -3, -27; 1980-26	1975: -6, -18.
Natural gasoline, def	1978-35M	
Net-back sale, def	1978-32; 1979-14	
New and released crude oil	1975-2; 1977-42M; 1979-19	1974-11.
New item and new market rule	1974: -23, -24; 1975: -3, -9; 1976: -5, -7; 1978-3.	1974-20.
"New" motor gasoline retail sales outlet	1975-61	
"New" wholesale purchaser-reseller	1975-57; 1977-26	1976-5.
Newly discovered crude oil	1980: -17, -25	
Non-product cost increases	1975: -48, -50, -74; 1978: -8, -13, -14, -52, -63; 1979-7; 1980-15.	1975: -1, -4, -10, -11, -14, -16.
Normal business practices	1974: -3, -18, -27; 1975: -49, -62; 1977: -8, -11, -19, -26, -35; 1978: -7, -21, -36, -56, -57; 1979: -8, -8, -10; 1980: -2, -8, -18, -19.	1974: -6, -10, -11, -23; 1975: -4, -11, -13.
Oil import regulations	1978-50	
Once-a-month rule	1975-64	
Over-recoupment	1975-12	
Passenger transportation services	1975-65	
Posted Price, def	1978-4; 1977: -26, -43; 1978: -17, -20, -30, -43.	1977-1.
Price, def		
Price increase	1977-53	1974-10.
Price/octane No. information and posting	1976-9	

APPENDIX C—SUBJECT INDEX FOR INTERPRETATIONS AND RULINGS ISSUED THROUGH DECEMBER 31, 1979—Continued

Subject	Interpretations	Rulings
Priority allocation levels.....	1979: -9, -15, -24; 1980: -4, -8, -32, -35.	
Procedural requirements.....	1975-40; 1976-12; 1977-28.	
Processing agreements.....	1974-6.	
Producer, def.....	1974-20; 1980: -22, -23.	
Producer of crude oil, price rule.....	1978-17.	
Product cost increases.....	1974-5; 1978: -40, -51 (rescinded); 1980-12.	1974: -5, -26, -27; 1975: 1-9, -10, -13, -18; 1977-3.
Product cost increases, carryover of.....	1975-16.	1974-12; 1975-16.
Propane allocation.....	1975-14; 1976: -19, -21.	
Propane prices.....	1978-4.	1974-5.
Property, def.....	1974-22; 1975: -2, -4, -27, -42; 1977: -1, -37, -42M, -46; 1978: -5, -9, -15, -18, -58M; 1979: -1, -17, -21; 1980: -17, -25.	1975-15; 1977: -1, -2, -7.
Reclamation of waste crude oil.....	1978-18.	
Record-keeping requirements.....	1979-12.	1976-6.
Refined petroleum products, def.....	1975-1; 1978-42; 1979-26.	
Refiner, def.....	1974-13; 1976-2; 1977: -6, -29; 1978: -22, -33, -63; 1979: -3, -16, -22, -26.	
Refiner gasoline price variation rules.....	1978: -36, -53.	
Refiner price formula:		
"A" factor.....	1978-40; 1980-29.	
"B" factor.....	1978-51 (rescinded).	
"V" factor.....	1975-7.	1974-27; 1975-7.
"H" factor.....	1977-23.	
"N" factor.....	1978: -8, -13, -14, -52; 1979-7; 1980-15.	
"Y" factor.....	1978-51 (rescinded).	
Refiner price rule.....	1977-53.	1974-26.
Refinery yield.....	1978: -11, -13; 1980-30.	
Refunds.....	1976-23.	
Rent, def.....	1975-12.	
Rent regulations (see also base rent rule).....	1975-51.	
Reporting requirements, refiner.....	1975-89.	1974: -7, -9, -14, -20, -24; 1975-3.
Reseller, def.....	1975-11; 1977-24.	
Residual fuel oil, def.....	1974-12; 1976-2; 1977: -3, -8, -29; 1978: -22, -33M, -63.	
Retail price rule.....	1975-29.	
Retail sales outlets, motor gasoline.....	1980-30.	
Retailer, def.....	1979-23.	1974-13.
Retaliatory actions.....	1974-12; 1976-2; 1978-22.	
Retroactive price increase.....	1975-63.	
Sales by Federal, State, and local governments.....	1977-14; 1978-2.	1974-22; 1976-3.
Sanitation services, def.....	1974-4; 1975-15.	1974-15.
Seller, def.....	1974-1; 1975-39; 1980-35.	
September 1975; application of price/allocation regulations during.....	1976-8.	1975-17.
Small refiner bias.....		
Social service agency use, def.....	1979-22.	
State set-aside program.....	1980-32.	
State tax increase pass-through.....	1980: -11, -21.	
Storage tank rentals.....	1975-18.	1974-4.
Stripper well lease exemption.....		1975: -4, -11.
Supplier, def.....	1974: -22, -26; 1975: -4, -10, -41, -43; 1977-48; 1978: -5, -9, -58M; 1979-21; 1980: -13, -14.	1974: 28, -29, -30; 1975-12; 1977: -1, -2, -6, -7.
Supplier/purchaser relationship.....	1975-23.	
Supplier substitution.....	1974: -17, -18, -19; 1975: -20, -54; 1976: -13, -14, -18; 1977: -20, -49; 1978: 23, -45, -46, -49, -56, -57, -59, -60; 1979: -18, -23, -25; 1980: -6, -16, -20.	1974: -3, -19; 1975-8.
Surplus product, purchase of.....	1976-25.	
Synthetic fuels.....	1974-19; 1975-20; 1977-41.	1976-4.
S.N.G. feedstock allocation.....	1975-34.	
Temporary discounts on May 15, 1973.....	1975-6.	
Tertiary incentive crude oil program.....	1980: -7, -22, -23.	
Transaction, def.....	1978-19.	1977-5; 1979-1.
Transfer pricing.....	1974-20; 1978: -61, -63; 1979-14.	
Transportation costs, def.....	1978-25.	

APPENDIX C—SUBJECT INDEX FOR INTERPRETATIONS AND RULINGS ISSUED THROUGH DECEMBER 31, 1979—Continued

Subject	Interpretations	Rulings
Transportation costs to reseller/retailer inventory.	1977: -4, -51	1975: -1, -9, -10.
Transportation cost, refiner.	1977-25; 1980-3	
United States, def.	1975: -8, -26, -46	
Unitization.	1974-22; 1975: -2, -4, -10, -27; 1978: -6, -9; 1980: -13, -17, -25.	1975-15; 1977-2.
Unleaded gasoline.	1976-3	
Unusual growth adjustment.	1980-34	
Waste crude oil, reclamation of.	1974: -11, -20; 1977-22.	
Wholesale purchaser-consumer, def.	1975: -37, -52; 1980: -32, -35	1974-19.
Wholesale purchaser-reseller, def.	1974: -10, -12; 1975: -13, -17, -19, -33, -37, -38, -53, -60, -67, -68, -70, -71, -72; 1977: -17, -27, -39, -40; 1978: -46, -59; 1979-6; 1980: -1, -2, -18, -24.	1975-8.

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Regulation interpreted ¹	Interpretations	Rulings
Part 202, subpart A.		1975-5.
205.2	1976-12; 1977-28	
205.26(d)	1975-40	
205.33(a)	1976-12; 1977-28	
205.194	1975-12	
205.202	1980: -6, -9, -19	
210.21	1975: -8, -26, -46; 1977-5; 1980-10	
210.32	1974: -22, -26; 1975: -4, -10, -41, -43	1974: -26, -29, -30; 1975-12; 1977-1.
210.33	1975: -8, -26, -46	
210.61	1975-63	1974-3.
210.62	1974: -3, -27; 1975-48; 1977: -8, -19, -26; 1978: -7, -21, -38; 1979: -6, -10; 1980: -2, -6, -16.	1974: -6, -10, -11; 1975: -4, -11, -13.
210.62(a)	1974-16; 1975: -62, -63; 1977-35; 1978: -56, -57; 1979-5; 1980: -9, -19.	
210.62(c)	1976-18; 1977-11; 1980-9	1974-23.
210.77	1975-51	
210.91	1977-24	
210.92		1978-6.
211.1(a)	1977-8	
211.9	1974: -15, -19; 1975: -58, -62; 1976-25; 1977: -19, -49; 1978: -46, -49, -59, -60; 1980: -11, -20.	1974: -3, -19.
211.9(a)	1974-18; 1975: -20, -54, -56, -73; 1977-8; 1978-23.	
211.9(c)	1977-20	
211.10	1975: -20, -56, -73; 1980-11	
211.10(a)	1975-35	
211.10(b)	1974-17; 1980-21	1974: -16, -25.
211.10(e)	1974-29	
211.10(f)	1974-19; 1978: -14, -21; 1977-41	
211.11	1974-17; 1975-61; 1976-19; 1980: -18, -20, -24.	
211.11(b)	1974-6	
211.11(d)	1975-35	
211.12	1975: -50, -57; 1978-11; 1980-11	
211.12(b)	1980-21	
211.12(e)	1974-17; 1976-19; 1977: -28, -49; 1978-38; 1979-25.	1974-19.
211.12(f)		1974-19.
211.12(h)	1976-18	
211.12(g)	1976-21	
211.13	1975-50	

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Regulation interpreted ¹	Interpretations	Rulings
221.13(c)	1976-12, 1977: -28, -32; 1978: -24, -38, 1979-20.	
211.13(f)	1977-28; 1978-24.	
211.14(d)		1974: -3, -16.
211.17(h)	1980: -11, -21.	
211.22	1975-23.	
211.24		1974-3.
211.24(a)	1974-25; 1976-11.	
211.25	1975-31; 1976-25; 1978-23.	
211.25(a)	1977-20.	
211.25(c)	1975-30.	
211.28	1980-16.	
211.29	1975-34; 1976-19.	
Special rule No. 1 to subpart A of part 211	1975-34; 1976-19.	
211.31	1977-8.	
211.51 (definitions)	See corresponding subject entry, app. C.	See corresponding subject entry, app. C.
211.62 (definitions)	See corresponding subject entry, app. C.	See corresponding subject entry, app. C.
211.63	1974: -2, -3, -4; 1975-45; 1976: -14, -20; 1977: -7, -13, -14, -15, -42M; 1978: -1, -45; 1979-18; 1980-8.	1974: -21, -22; 1977-8.
211.64	1974: -2, -3.	
211.64(a)		1974-11.
211.65	1974-6; 1977-34; 1978-39; 1979-8.	1976-1.
211.67	1977: -5, -22, -31; 1978-31; 1979: -4, -26; 1980: -27, -29.	1976-3.
211.67(a)(4)	1978-48.	
211.67(d)(2)	1975-22; 1976-22; 1977: -16, -30, -36, -44; 1978: -10, -42, -54, -55; 1980-10.	
211.67(d)(5)	1977-45.	
211.71(c)	1976-23.	
Special rule No. 7 to subpart C of part 211	1976-22.	
211.82	1976-21; 1978-49; 1980-20.	
211.83	1975-14; 1980-20.	
211.83(c)	1976-19.	
211.85	1978-49.	
211.86	1978-49.	
211.96(b)	1977-49.	
211.102	1975: -20, -73; 1980: -8, -32, -35.	
211.103	1975-65; 1979: -9, -15, -24; 1980: -4, -8, -32.	
211.103(a)	1974-1.	
211.104	1974-6; 1980-34.	
211.105(d)	1979-25.	
211.105(f)	1980-11.	
211.106	1975: -58, -61, -73; 1976-11; 1977: -19, -47; 1980-16.	1974-13; 1976-5.
211.106(b)	1974: -12, -25.	
211.106(c)	1975-53; 1977-19.	
211.106(d)	1974-25.	
211.106(e)	1975-57; 1979-23.	
211.145	1976-13.	1974-8.
211.145(c)	1974-21.	
211.145(d)	1974-21.	
211.162	1975-54.	
211.166	1974-19.	
211.182	1978-47.	
211.183	1975-44.	
211.201	1975-37.	
211.202	1975-37.	
211.203(c)(2)(iii)	1975-37.	
212.1		1975-3.
212.2	1975-24.	
212.31 (definitions)	See corresponding subject entry, app. C.	See corresponding subject entry, app. C.
212.52	1974-4; 1975-15.	
212.53	1975-24; 1976-22.	1975-7.
212.53(a)	1977: -16, -21, -36, -44; 1978: -10, -55.	

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Regulation interpreted ¹	Interpretations	Rulings
212.53(c)	1977-30	
212.54	1974: -22, -26; 1977: -2, -48; 1978: -5, -9, -58M; 1979-21; 1980: -13, -14.	1977: -6, -7.
212.55	1977-2	1978-3.
212.71	1974-11	
212.72	1974: -8, -11; 1975: -2, -4, -27; 1976-16; 1977: -1, -3, -12, -33, -37, -38, -42M, -46, -52; 1978: -5, -12, -15, -18, -58M; 1979: -1, -17, -19, -21; 1980-25.	1977-7.
212.73	1974-11; 1975-42; 1977: -2, -3; 1978-20.	
212.74	1974: -8, -11; 1975: -2, -4, -42; 1977: -2, -3; 1978: -2, -17, -20, -30, -43; 1979-1.	1974-11.
212.74(c)	1977-14	
212.75	1978-6; 1980: -17, -25	1977-2.
212.76		1976-2.
212.76	1980: -7, -22, -23	
212.79	1980: -17, -23	
212.81	1977-29	
212.82	1975: -5, -47; 1976: -3, -4, -5; 1977: -8, -18; 1980-12.	1974: -17, -18.
212.82(a)	1976-1	
212.82(b)	1978: -22, -31	
212.83	1974-20; 1975: -3, -5, -7; 1978-10; 1977: -23, -53; 1978-16; 1979: -2M, -3; 1980: -12, -16, -19.	1974: -12, -26, -27; 1975: -6, -7, -13.
212.83(b)	1976-4	
212.83(c)	1978-40	
212.83(c)(1)(i)(C)	1980-30	
212.83(c)(1)(ii)(B)	1974-5	
212.83(c)(1)(iii)(C)	1980-29	
212.83(c)(2)(ii)(D)	1976-51 (rescinded) 1980-15	
212.83(c)(2)(ii)(E)	1978: -8, -11, -13, -14, -52; 1979-7	
212.83(e)	1975: -12, -16	
212.83(h)	1978-17; 1978: -36, -53; 1980-15.	
212.84	1979-11	1977-4.
212.85	1977-25	
212.85(d)	1980-3	
212.88	1974-26	
212.91	1974-14; 1975: -3, -59; 1977: -3, -6, -24, -29; 1978-63.	
212.92	1975: -48, -74; 1978: -6, -8; 1977: -4, -51; 1980: -15, -30.	1975: -1, -9, -10.
212.93	1974: -5, -12; 1975: -6, -9, -18, -59, -74, 1978-6; 1977-4.	1974: -4, -17.
212.93(a)	1976-7; 1977-3; 1980-30	
212.93(b)	1975: -48, -55, -64	
212.93(e)		1975: -1, -10, -14, -16.
212.94	1978-39; 1979-8	1975-16.
212.101	1975-58	1974-26.
212.102	1974-24; 1975: -51, -58	
212.103	1975-51	1974: -7, -9, -14, -20, -24; 1975-3.
212.111	1974: -23, -24; 1975: -3, -9; 1978: -5, -7; 1978-3.	1974: -7, -9, -14, -20, -24; 1975-3.
212.111(c)(2)	1978-18	
212.112	1976-3	
212.126	1975-11	
212.126	1978-12	1976-6.
212.129	1976-9	
212.131	1977: -33, -52; 1980-14	
212.131(a)(2)	1978-12	
212.161	1976-2; 1978: -61, -63; 1979-3	
212.161(b)(2)	1978-29	
212.162	1977-3; 1978: -3, -27, -32, -35M, -37, -41, -61, -62, -63; 1979-14; 1980-28.	
212.163	1978: -32, -61, -63	
212.163(a)	1978-5; 1977-3	
212.164	1978: -29, -61, -63	

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Regulation interpreted ¹	Interpretations	Rulings
212.164(a).....	1975-5	
212.164(e).....	1980-26	
212.165.....	1978-18; 1980-26	
212.166.....	1978-61	1975-18.
212.166(b)(3).....	1978: -27, -37, -41, -62	
212.167(b).....	1978: -16, -34; 1979-2M	
212.168.....	1978-34; 1979-3	
212.169.....	1978-32	
212.170.....	1978-16	
212.182.....	1978-25	
212.183.....	1978-25	
213.35.....	1978-50	
215.3.....	1975-25	
215.5.....	1975-25	
10 CFR:		
Part 430.....	1978-26; 1980-26	1980-1.
Part 490.....	1980-33	
Fuel use act regulations: 500.2(a).....	1980-5	

¹ Regulations listed as cited in interpretations and rulings. No attempt has been made to change citations to reflect those relatively few cases in which regulations have been renumbered.

[45 FR 74428, Nov. 7, 1980]

APPENDIX E—RULINGS CONSTRUED BY
INTERPRETATIONS ISSUED THROUGH
DECEMBER 31, 1979

Rulings and Interpretations

1974-3, 1975: -61, -62; 1976-25; 1980: -18, -20, -24	1975-4, 1977-11; 1978-7
1974-4, 1975-18	1975-6, 1979-2M
1974-10, 1974-16	1975-8, 1975: -33, -60, -67, -70, -71, -72;
1974-11, 1976-15	1976-23; 1977: -17, -27, -39, -40; 1979-6;
1974-15, 1975-39	1980: -18, -24
1974-17, 1975-66	1975-9, 1975-74, 1977: -4, -51
1974-18, 1975: -6, -66; 1976-20	1975-10, 1977: -4, -51
1974-19, 1974-15; 1975: -52, -56	1975-11, 1977-11; 1978-7
1974-20, 1974-24	1975-12, 1975: -41, -43; 1977-48
1974-22, 1977-7	1975-14, 1976-8
1974-24, 1974-28	1975-15, 1975-42; 1978: -6, -9, -15; 1979: -1, -17; 1980-25
1974-29, 1975: -41, -43	1975-18, 1978-62; 1980-31
1975-1, 1975-74; 1977: -4, -51	1977-1, 1977: -1, -26, -37, -43; 1978-15; 1979: -1, -17; 1980-17
1975-2, 1975: -22, -47, -63, -66; 1976: -1, -7, -20; 1980-16	1977-2, 1980: -6, -15; 1979-17
	1977-4, 1979-21
	1977-5, 1978-19
	1980-3, 1980-25

[45 FR 74430, Nov. 7, 1980]

APPENDIX F—STATUTES CONSTRUED BY INTERPRETATIONS AND RULINGS ISSUED THROUGH
DECEMBER 31, 1979

Statutes	Interpretations	Rulings
Economic Stabilization Act of 1970, as amended.	1975-12; 1976-24	
Energy Policy and Conservation Act of 1975, as amended.	1977: -7, -12, -22, -26, -38, -42; 1978-26	
Energy Supply and Environmental Coordination Act of 1974.		1975-5.
Emergency Petroleum Allocation Act of 1973, as amended.	1974: -6, -13, -22, -26, -27; 1975: -1, -5, -8, -12, -15, -56, -66; 1978: -4, -6, -12, -20, -21, -22, -23, -24; 1977: -3, -5, -7, -11, -28, -42; 1978: -1, -4, -51 (rescinded); -54; 1980-6.	1974: -3, -26; 1975-17; 1976-4; 1977-1.

APPENDIX F—STATUTES CONSTRUED BY INTERPRETATIONS AND RULINGS ISSUED THROUGH
DECEMBER 31, 1979—Continued

Statutes	Interpretations	Rulings
Federal Energy Administration Act of 1974	1974-13	1975-5.
Freedom of Information Act		1975-2, -4.
Fuel Use Act	1978-26; 1980-5, -28, -33	1976-3.
Naval Petroleum Reserves Production Act of 1976		1975-12; 1977-1.
Trans-Alaska Pipeline Authorization Act		

[45 FR 74430, Nov. 7, 1980]

SUBCHAPTER B—COAL

PART 300—THE COAL LOAN GUARANTEE PROGRAM

SOURCE: 43 FR 51956, Nov. 7, 1978, unless otherwise noted.

Subpart A—General Provisions, Purpose, and Objectives

- Sec.
300.01 Purpose and objectives.
300.02 Definitions.
300.03 Full faith and credit provision.
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300.24 Consideration of environmental impacts and historical preservation.

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300.41 Conditional commitment.
300.42 Personal and corporate financial statements.
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300.44 Mandatory purchase of flood insurance.
300.45 Interest rate.
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300.47 Disbursements.

Subpart D—Servicing the Guaranteed Loan

- 300.50 Loan servicing and reporting requirements.
300.51 Collateral.
300.60 Project monitoring and auditing.
300.61 Assignment or transfer of guaranteed loan.
300.62 Reduction or withdrawal of guarantee.

Subpart E—Default

- 300.80 Default.
300.81 Nonpayment to holder.
300.82 Liquidation.
300.90 Disclosure.
300.92 Noninterference with Federal, State, and local requirements.
300.93 Appeals.

AUTHORITY: Sec. 102, Energy Policy and Conservation Act and Sec. 164, Energy Conservation and Production Act.

Subpart A—General Provisions, Purpose, and Objectives

§ 300.01 Purpose and objectives.

The coal loan guarantee program is designed to encourage and assist small- and medium-sized coal producers to increase the Nation's coal production from low-sulfur underground mines. These regulations provide the necessary information to apply for and obtain U.S. Government loan guarantees to develop new underground coal mines, to expand existing underground coal mines, and to reopen underground coal mines which had previously been closed.

§ 300.02 Definitions.

For the purpose of this part:

(a) "Act" means the Energy Policy and Conservation Act of 1975 (Pub. L. 94-163), as amended.

(b) "Affiliate" means a person who directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with another specified person. For the purpose of this definition, control means direct or indirect possession of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(c) "Applicant" means any person who applies to the Department of Energy (DOE) for a guarantee of a loan with respect to a coal project. The applicant is also the borrower.

(d) "Application" means the written request of an applicant for a loan guarantee in accordance with the requirements of this regulation.

(e) "Borrower" means any person directly liable for repayment of any part of a loan guaranteed by DOE.

(f) "Coal sales contract" means a written coal sales agreement or agreements for at least the duration of the period during which a guaranteed loan is required to be repaid, for the direct

and indirect sale or resale of coal to be produced from the subject mine to a person who the Administrator of the Environmental Protection Agency (EPA) certifies will be able to burn such coal in compliance with all applicable requirements of the Clean Air Act (42 U.S.C. 1857 et seq.), and with any applicable implementation plan (as defined in section 110 of the Clean Air Act).

(g) "Conditional commitment" means that document, issued by DOE, which sets forth specifically or by reference, the terms and conditions under which DOE may issue a guarantee.

(h) "DOE" means the Department of Energy.

(i) "Guarantee" means the written guarantee agreement issued by DOE setting forth DOE's undertaking to pay the lender or holder, as applicable, in the event of a default, the principal and accrued interest on the guaranteed portion of the loan.

(j) "Holder" means the person other than the lender who has lawfully succeeded in due course to all or part of the right, title, and interest of the lender in the guaranteed portion of the loan.

(k) "Lender" means any person making and servicing a loan guaranteed by DOE.

(l) "Loan" means any note, bond, or other evidence of indebtedness.

(m) "Loan agreement" means the written contract between the borrower and the lender specifying the terms and conditions under which the lender provides financing to the borrower.

(n) "Low-sulfur coal" means coal which, in a quantity necessary to produce 1 million British thermal units, does not contain sulfur or sulfur compounds the elemental sulfur content of which exceeds 0.6 pound. Sulfur content shall be determined after the application of any coal preparation process which takes place before the sale of the coal by the borrower.

(o) "Person" means any individual, partnership, corporation, association, joint venture, or any other entity.

(p) "Project" means an undertaking by the borrower, to be financed in whole or in part by a loan for which a

guarantee is hereunder applied for, which will produce coal by the development of any new underground mine, expansion of any existing underground mine in a manner designed to increase production of such mine, or the reopening of any underground mine which had previously been closed.

(q) "Secretary" means the Secretary of DOE, or his duly designated representative.

§ 300.03 Full faith and credit provision.

Any guarantee issued by DOE under these regulations shall be conclusive evidence that the guaranteed loan qualifies for such guarantee, and the validity of such guarantee so made shall be incontestable in the hands of a holder, except for fraud or material misrepresentation on the part of such holder.

§ 300.04 Department of the Treasury concurrence.

The Secretary shall consult with the Secretary of the Treasury concerning the terms and conditions of the guarantee. The Secretary shall obtain the concurrence of the Secretary of the Treasury with respect to the date of issue of any loan guarantee, except that this concurrence may not, without the consent of the Secretary, result in a delay in the issuance of a guarantee for more than 60 calendar days.

Subpart B—Applications

§ 300.20 Determination of eligibility.

(a) Each application must include a statement from the borrower representing that the borrower (including affiliates) did not, in the prior calendar year, meet any one of the following conditions:

- (1) Produce more than 1,000,000 tons of coal;
- (2) Produce more than 300,000 barrels of crude oil;
- (3) Own an oil refinery; and
- (4) Have gross revenues in excess of \$50,000,000.

(b) The applicant must also submit a statement representing that there is no unsatisfied final judgment that

holds the borrower (or affiliates) liable for any fine or penalty under the Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164).

§ 300.21 General application information requirements.

The applicant must provide, at the time of application, the following:

(a) Evidence that the borrower owns, leases, or otherwise controls sufficient economically recoverable coal reserves at the site described in the application to produce sufficient coal to permit the borrower to honor any obligation under the coal sales contract;

(b) A letter of intent to purchase coal, a coal sales contract, or a draft coal sales contract, for the sale or resale of the coal to be produced from the project, and, if appropriate, the Secretary may require sufficient financial information concerning the purchaser of such coal, showing that said purchaser has the capability to carry out the coal sales contract;

(c) An estimate of the sulfur content of the coal reserves, as mined and as sold, at the site described in the application;

(d) Adequate assurance that the mine will be constructed and operated in compliance with the Federal Mine Safety and Health Act of 1977;

(e) Evidence that the borrower has been unable to obtain adequate financing without such guarantee. Such evidence may consist of a signed statement from the lender representing that the lender would not provide financing under the proposed terms without a Federal guarantee;

(f) A statement from the lender disclosing whether any of its officers or directors, major stockholders, or other owners have a financial interest in the borrower. The lender will also disclose whether any of the borrower's officers or directors, stockholders, or other owners have a financial interest in the lender;

(g) A full description of the scope, nature, extent, and location of the project, and a copy of the mine development plan (normally the same plan submitted to Federal and State officials will suffice), which includes a description of the processes and methods

the borrower plans to use in the project;

(h) A list of permits, licenses, and other authorizations required by local, State, or Federal authorities prior to opening of the proposed mine, with copies of any permits already issued, and a schedule of expected dates of application and expected approval dates for the remaining required permits; and

(i) Environmental data describing the environmental characteristics and impacts of the project.

§ 300.22 Financial and other application information requirements.

(a) The applicant shall provide information in support of the application, such as prescribed below. The Secretary may require additional information at his discretion in order to adequately evaluate the likelihood of repayment of the loan:

(1) A description of the borrower's organization and nature of activities, including a copy of the business certificate, partnership agreement or corporate charter, bylaws, and appropriate authorizing resolutions;

(2) A description of the affiliates of the borrower;

(3) Resumes of the borrower's key employees, which include, in reverse chronological order, their business and managerial experience, with emphasis on history of recent experience in the coal industry;

(4) A description of any other Federal financial assistance (e.g., direct loans, guaranteed loans, grants, or contracts) expected to be applied for or already obtained by the borrower in connection with the project;

(5) Itemized estimates of costs of the project;

(6) A summary of insurance coverage for the project;

(7) A schedule of salaries (and other financial remuneration, including profit sharing and stock options) to be paid to officers and key employees of the borrower who are, or will be, directly associated with the project;

(8) A technical and economical feasibility report, which includes:

(i) Coal reserve quantification;

(ii) Coal reserve quality;

- (iii) Site inspection;
- (iv) Assets value appraisal;
- (v) Mining method;
- (vi) Mining costs;
- (vii) Financial analysis; and
- (viii) Comparable property evaluation.

(9) A list identifying the collateral to be pledged to secure the loan, together with the estimated market value and source(s) of such estimated values.

(b) Evidence must be submitted which will enable DOE to make an independent evaluation of the creditworthiness of the borrower and the project for which a loan guarantee is sought. The evidence submitted should consist of, but need not be limited to:

(1) The credit analysis performed by the lender; and

(2) The following financial statements of the borrower, including adequate explanation, and covering the 3 most recent fiscal years, if applicable:

- (i) Balance sheet; and
- (ii) Income statement.

(3) A pro forma income statement and projected source and uses of funds statement must be submitted for the first 5 years of the project. In the case of mine expansion projects, the borrower shall submit a cash flow statement for total production, and a separate cash flow statement for the production from the expansion operation.

(4) The borrower's interim balance sheet and income statements, prepared within 90 days of the date of application, if the annual statements contained in paragraphs (b) (1) and (2) of this section are more than 3 months old. It is desirable that these statements be audited by an independent certified public accountant.

§ 300.23 Project cost documentation requirements.

(a) Except as provided in paragraph (b) of this section, reasonable and customary costs actually paid, or to be paid by the borrower applicable to the development of a project, are generally permitted in computing the estimated aggregate project cost, as approved by the Secretary. However, the Secretary reserves the right to exclude any such costs in determining the estimated aggregate project cost for the guar-

antee. All costs for facilities and plant and equipment must relate to, and be used substantially in connection with the project. These costs related to the project include, but are not necessarily limited to, the following:

(1) Land and/or mineral rights purchase and lease payments, including reasonable real estate commissions;

(2) Acquisition or construction of buildings, including offices, bathhouses, lamphouses, and other buildings related to the project;

(3) Coal preparation plant construction, including all support equipment;

(4) Coal handling facilities, including tipplers, storage facilities, and related equipment;

(5) Mining equipment, including continuous miners, short and long wall equipment, shuttle cars, loaders, roof bolters, trucks, conventional mining equipment, conveyor belt systems, and all other equipment necessary for coal mine development and production;

(6) Powerplant equipment and transmission lines, including installation costs;

(7) Employee salaries, wages, and benefits, consultant fees, and independent contractor costs;

(8) Surveys and title insurance costs; and engineering, recording, and legal fees incurred in connection with land and/or mineral rights acquisition;

(9) Technical, financial, and environmental feasibility studies;

(10) Infrastructure, including site preparation, rail systems, access roads, and related support facilities;

(11) Transportation equipment;

(12) Refuse disposal systems;

(13) Water treatment systems;

(14) Air pollution control systems;

(15) Ventilation systems;

(16) Communications systems;

(17) Insurance and bonds;

(18) Costs of safety and environmental protection equipment, facilities, and services;

(19) Legal and accounting fees for mine permit acquisition and mine development;

(20) Royalty payments and license fees;

(21) Reasonable loan fees;

(22) Interest on interim construction financing;

(23) Costs of complying with the terms and conditions specified in the guarantee, or required by local, State, and Federal government laws and regulations;

(24) Initial working capital;

(25) Other costs not specified, but directly related to the project, which are reasonable and necessary;

(26) A contingency reserve.

(b) Costs which are not considered as project costs, and are excluded from the guaranteed portion of the loan are illustrated below:

(1) Dividends and profit sharing to stockholders, employees, and officers;

(2) Expenses not paid or incurred by the borrower;

(3) Normal operating expenses incurred after an initial period of start-up; and

(4) Costs that are excessive, or are not directly required to carry out the project.

§ 300.24 Consideration of environmental impacts and historical preservation.

(a) The issuance of a Federal guarantee for a loan under this program is subject to the provisions of the National Environmental Policy Act (NEPA), which requires identification and environmental review of "major Federal actions significantly affecting the quality of the human environment," and the DOE regulations which implement this Act.

(b) DOE will initially review the environmental data submitted by applicants for guarantees under this program. Upon completion of this review, DOE may issue a finding that no significant environmental impact is anticipated, or may conduct a more detailed environmental review pursuant to its NEPA regulations.

(c) In addition to the general criteria used for a determination as to the level of environmental review to be accorded individual applications under this program, DOE has determined that it will not routinely conduct a detailed environmental review (i.e., an environmental assessment or environmental impact statement) for:

(1) Underground coal mines of less than 100,000 annual designed tonnage, unless such a review is warranted in a particular case, based on information

available to DOE indicating that impacts relating to any of the following may be significant: Archeological sites; sensitive ecosystems; habitats of endangered species; historic sites; wild and scenic rivers; wetlands, prime agricultural lands; significant surface water or groundwater pollution; recreational land uses; air quality; noise levels; mining in a saturated zone; presence of toxic overburden; mining in alluvial valley floors; and

(2) Underground coal mines of greater than 100,000 annual designed tonnage, where the applicant certifies on the environmental impact questionnaire that he will use "Best Practice Procedures" as set forth in a document published by EPA entitled, "Best Practices for New Source Surface and Underground Coal Mines" (42 FR 47934). Copies of this proposed regulation will be supplied by DOE upon request.

(d) The EPA must provide certification that the borrower's coal can be burned by the purchaser of such coal under the coal sales contract in compliance with all applicable provisions of the Clean Air Act, and of any applicable implementation plan.

(e) No guarantee will be issued prior to the completion of the NEPA process. Where the NEPA process reveals that mitigation steps should be included as conditions to the guarantee, those steps shall be required by DOE to prevent or minimize significant environmental impacts.

(f) DOE will afford the Advisory Council on Historic Preservation an opportunity to review and comment upon applications for guarantees for any project which would affect property listed or eligible for listing in the National Register of Historic Places or which may meet the criteria for listing in the National Register, pursuant to 36 CFR Part 800.

Subpart C—Application Processing and Guarantee Conditions

§ 300.40 Approval criteria.

The Secretary will evaluate the proposed project and will determine whether the following criteria have been met:

§ 300.41

10 CFR Ch. II (1-1-86 Edition)

(a) That the amount of a guarantee issued with respect to any loan does not exceed 80 percent of the lesser of (1) the original principal balance of the loan, or (2) the cost of the project;

(b) That the total amount of Federal financial assistance, including guarantees under this regulation obtained by the borrower for the project, does not exceed 80 percent of the estimated aggregate cost of the project to be undertaken by the borrower;

(c) That the total amount of guarantees outstanding at any time on behalf of any borrower (including all persons affiliated with such borrower) does not exceed \$30,000,000 in principal amount;

(d) That the borrower is unable to obtain adequate financing without a guarantee;

(e) That the guarantee will enhance competition or encourage new market entry;

(f) That the terms of such a guarantee requires repayment of the loan over a period of no more than 30 years, or a period no longer than the term of the coal sales contract, whichever is less, as determined by the Secretary;

(g) That a coal sales contract has been executed prior to the issuance of a guarantee, and that the EPA has certified that the project coal can be burned by the purchaser in compliance with all applicable provisions of the Clean Air Act, and of any applicable implementation plans. The coal sales contract need not necessarily provide for the sale of all coal production from the project, but should indicate that there is sufficient revenue from sales to provide reasonable assurance of repayment of the loan;

(h) That the borrower has adequate coal reserves to cover the coal sales contract;

(i) That the borrower is of established integrity and demonstrated management capability, and is capable of successfully developing and operating the project mine(s);

(j) That there is a reasonable prospect of repayment of the loan;

(k) That the proceeds from the loan, together with other available funds, are sufficient to successfully carry out the project;

(l) That the assets obtained from the proceeds of the loan are pledged as collateral, and that the total value of all collateral pledged is adequate to protect the interests of the U.S. Government;

(m) That the project is environmentally acceptable;

(n) That the lender is capable of performing the servicing requirements of Subpart D of this regulation; and

(o) That the terms and conditions of the loan agreement, including interest rates, are acceptable to the Secretary.

§ 300.41 Conditional commitment.

A conditional commitment to guarantee the loan may be issued by the Secretary. A conditional commitment will state that the Secretary is prepared to guarantee a loan, and will further state the terms and conditions under which the guarantee may be issued. No amendment to a conditional commitment shall be made unless reduced to writing and duly executed by the parties to the conditional commitment.

§ 300.42 Personal and corporate financial statements.

(a) Personal endorsements of the loan may be required from major stockholders, owners, or others having a major interest in the borrower. Endorsements of the loan by parent, subsidiary, or affiliated companies may also be required.

(b) Persons who endorse the loan will:

(1) In the case of personal endorsements, provide current financial statements (not over 90 days old at the time of filing), that fairly represent the financial position of the endorsers;

(2) In the case of corporate endorsers, provide current financial statements, including income statement, balance sheets, and a statement of uses and application of funds (not over 90 days old at the time of filing), represented by an officer of the corporation, presenting fairly the financial position and results of operations of the corporation.

§ 300.43 Guarantee conditions.

(a) The guarantee shall include the terms and conditions necessary to implement the requirements of this regulation; and any additional terms and conditions deemed to be appropriate by the Secretary to protect the interests of the U.S. Government.

(b) The guarantee shall also include appropriate provisions concerning nondiscrimination and fair lending practices as may be required by applicable statutes, Executive orders, and implementing regulations.

§ 300.44 Mandatory purchase of flood insurance.

The Flood Disaster Protection Act of 1973 (Pub. L. 92-234) may require that the borrower purchase flood insurance as a condition of receiving a guarantee on a loan for acquisition of real estate or construction purposes in an identified flood plain area having special flood hazards. Questions emanating from borrowers or lenders regarding compliance with provisions of the Flood Disaster Protection Act and guidelines should be referred to the Department of Housing and Urban Development's Federal Insurance Administration. When the purchase of flood insurance is required, as finally determined by the Secretary, such costs can be included by the borrower in the estimated project cost.

§ 300.45 Interest rate.

Interest rates for guaranteed loans shall be negotiated between the borrower and the lender, but must be approved by the Secretary. Interest rates may be fixed or variable, provided they are legal in the appropriate jurisdiction. If approved by the Secretary, one interest rate may apply to the guaranteed portion of the loan, and another interest rate may apply to the unguaranteed portion of the loan. The interest rate should reflect the value, in terms of security to the lender, of the Government guarantee.

§ 300.46 Annual guarantee fee.

(a) An annual guarantee fee imposed on the guaranteed portion of the loan, and computed at a rate to be set forth in the guarantee, will be collected from the lender and used for the pur-

pose of defraying the administrative costs of the program. The rate shall be imposed on the unpaid balance of the guaranteed portion of the loan that is outstanding on each loan anniversary date. The guarantee fee may be passed to the borrower by the lender and, in such instances, may be included as an eligible project cost.

(b) At the time the guarantee is executed, the lender shall present to the Secretary, payment of the first year's annual guarantee fee.

(c) The Secretary will evaluate, at least annually, whether the guarantee fee then in effect is sufficient to cover anticipated administrative costs and, whenever appropriate, will establish a revised fee schedule to be applied to the new guarantees. The payment of the guarantee fee by the lender, or lack thereof, will in no way impair the guarantee to a holder of the guaranteed portion of the loan that is outstanding during the year.

(d) The guarantee fee fixed by the Secretary for any guarantee shall not exceed 1 percent per annum on the guaranteed portion of the loan that is outstanding during the year.

§ 300.47 Disbursements.

The guarantee shall provide the procedure and documentation requirements for loan disbursements and drawdowns. As a minimum, the guarantee shall stipulate that the lender shall not provide the borrower with any funds under the loan agreement until:

(a) The lender has provided the Secretary with an updated schedule of milestones under the project, indicating dates and amounts of future loan disbursements and drawdowns, and the lender has received written approval for each milestone loan disbursement from the Secretary.

(b) The lender has received from the borrower a written statement in support of each request by the borrower for loan drawdowns. The statement shall detail the purposes for which loan disbursements or drawdowns is requested, and a certification that such disbursements will be used only for the stated purposes. When appropriate, copies of invoices to be paid,

copies of invoices and lien waivers, and copies of cancelled checks shall be attached to the statement. The statement shall be signed by a person authorized to order expenditure of the borrower's funds.

(c) The lender has verified that loan disbursements and drawdowns approved under prior milestones have been used only for the previously stated purposes.

Subpart D—Servicing the Guaranteed Loan

§ 300.50 Loan servicing and reporting requirements.

Loan servicing is the responsibility of the lender. The guarantee will specify the lender's servicing requirements which include, but are not limited to, loan disbursements under § 300.47, and notification by the lender to the Secretary immediately upon knowledge, but in no event within more than 30 calendar days of:

(a) Any nonpayment by the borrower of the principal or interest on the date specified in the loan agreement, together with appropriate notices to the borrower;

(b) Any failure by the borrower, known to the lender, to comply with the terms and conditions as set forth in the loan agreement; and

(c) Any information or circumstance which has caused the lender to believe that repayment of the loan is in jeopardy.

§ 300.51 Collateral.

(a) The lender is responsible for seeing that proper and adequate liens upon all collateral are obtained and maintained in existence and of record to protect the interest of the lender, the U.S. Government, and any holders of the guaranteed loan. The lender will be the mortgagee, or secured party of record, with regard to such collateral, notwithstanding the fact that another party may hold a portion of the loan.

(b) Collateral may include, but is not necessarily limited to, the following: Land, buildings, machinery, equipment, furniture, fixtures, inventory, accounts receivable, cash or special

cash collateral accounts, marketable securities, and cash surrender value of life insurance policies. Collateral may also include assignments of leases or leasehold interests, revenues, patents, copyrights, and contract rights.

(c) The lender may not take separate collateral to secure only that portion of the loan not covered by the guarantee. The lender may not require compensating balances or certificates of deposit, other than as used in the ordinary course of business, as a means of reducing its exposure on the unguaranteed portion of the loan.

(d) First liens on all assets pledged as collateral will be preferred. Loans collateralized entirely with secondary or other inferior lien positions will receive lower priority treatment under the program.

§ 300.60 Project monitoring and auditing.

(a) The guarantee shall provide that the lender and the borrower shall keep such records concerning the project as is necessary to facilitate an effective audit and performance evaluation of the project. The guarantee shall also provide that the Secretary of Energy, the Secretary of the Treasury, and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers, and records of the borrower and the lender. Such inspection may be made during the regular office hours of the borrower or the lender, or at any other time mutually convenient.

(b) The Secretary may undertake certain loan monitoring functions which will be performed by a representative of the Secretary acting in coordination with the lender's loan servicing. Specifically, the Secretary's role in loan monitoring may include, but not necessarily be limited to, the following:

(1) Written approval of all requests for disbursements as set forth in the guarantee. Requests for disbursements should be aggregated to cover milestones of the project, such as infrastructure improvements, equipment purchases, etc.;

(2) Review of periodic financial statements of the borrower; and

(3) Periodic inspection of the collateral pledged to secure the loan and the borrower's operating facilities and records.

§ 300.61 Assignment or transfer of guaranteed loan.

(a) The lender may assign, participate, sell, or otherwise transfer any part or all of his right, title, and interest in the guaranteed loan, subject to the procedures and limits specified in the guarantee. The lender will, however, continue to be responsible for the collateral and servicing of the loan, unless the Secretary approves a substitute lender.

(b) When a guaranteed portion of a loan is transferred from the lender to a holder, the holder then succeeds to all rights of the lender in the guarantee to the extent of the portion of the loan purchased by the holder.

(c) The assignment agreement of the guaranteed portion of the loan, or any part thereof, shall be executed by the holder, the lender, and the Secretary, and will set forth (specifically or by reference) the terms and conditions of the assignment.

(d) After assignment, sale, or transfer of all or part of a guaranteed loan, the lender shall promptly remit to the holder or other party then having an interest in the loan, their respective pro-rata shares of all payments received by the lender in connection with the loan, less only the lender's servicing fee (if any) as mutually agreed by the lender and the appropriate other party. Unless otherwise specified in the assignment agreement, all such payments due from the lender shall be made within 30 calendar days of the lender's receipt of the corresponding amounts.

(e) The guarantee shall be conclusive proof that the guarantee and the underlying loan are in compliance with the provisions of this regulation, and that such loan has been approved and is legal as to disbursed principal and accrued interest and other terms.

§ 300.62 Reduction or withdrawal of guarantee.

(a) The Secretary may reduce or withdraw the guarantee of loan amounts not yet drawn down by the borrower upon written notice to the lender and the borrower, if:

(1) Initiation of activity on the project has not occurred within the period of time set forth in the guarantee;

(2) The borrower has failed to comply with any material term or condition as set forth in the loan agreement. Drawdowns approved by the lender after such notification is received will not be covered by the guarantee;

(3) The lender has failed to comply with any material term or condition set forth in the guarantee. The guarantee may be reduced to the amount that has been received by the borrower as of the date the Secretary's notice has been received by the lender; or

(4) The Secretary and the lender determine that the project's economic success is no longer achievable. The guarantee shall be reduced to amounts which have been received by the borrower as of the date of the notice.

(b) In the event of paragraph (a) (2), (3), or (4) of this section, the holder(s) of the guarantee or portions thereof shall nevertheless have an incontestable right to the disbursed amount of principal and accrued interest thereon, except for fraud or material misrepresentation on the part of the holder.

Subpart E—Default

§ 300.80 Default.

(a) In the event of nonpayment of principal and/or interest due on the loan by the borrower under the terms of the loan, the lender shall notify the Secretary promptly, but in no event later than 30 calendar days of the occurrence of such nonpayment, provided such nonpayment has not been cured. If such default remains uncured for a total period of 45 calendar days or more from the date of nonpayment, the lender may elect, with the concurrence of the holder(s), if any, and with the approval of the Secretary, to defer payment from the borrower of any

overdue principal and accrued interest, or to reschedule the overdue and subsequent loan payments.

(b) If the lender and the holder(s), if any, cannot agree with the borrower to defer or reschedule the borrower's payment(s), either the lender or the holder(s), if any, may:

(1) Demand payment by the Secretary of any overdue amounts of guaranteed principal and accrued interest due from the borrower as a result of the default; or

(2) Demand payment by the Secretary of the entire outstanding guaranteed principal balance of the loan, and all unpaid interest accrued thereon to the date of the Secretary's payment hereunder.

(c) Upon receipt by the Secretary of a demand for payment as aforesaid, the Secretary shall pay the amounts lawfully demanded under the terms of the preceding paragraph, within 60 calendar days of the date of such demand. In the event the demand is for an overdue payment under paragraph (b)(1) of this section, the Secretary may, in his discretion, consider the loan in default and pay the outstanding guaranteed balance of the loan with accrued interest.

(d) If the overdue amounts of guaranteed principal and accrued interest are paid by the Secretary, the loan remains in default until the borrower reimburses the Secretary for such payment(s). When the borrower remains in default, the Secretary may take action necessary to protect the interest of the U.S. Government.

(e) In the event of any payment under a guarantee, the Secretary shall be subrogated to the rights and remedies of the parties to which payment is made.

§ 300.81 Nonpayment to holder.

(a) In the event of the nonpayment by the borrower of a scheduled payment, the holder shall first make demand upon the lender for such payment, or for the repurchase of the holder's interest in the guaranteed loan. The holder shall provide the Secretary with notice of such demand for payment within 10 calendar days. The lender shall have the option to advance the overdue payments or to re-

purchase the guaranteed portion(s) of the loan according to the holder(s) demand. If the lender does not make the payment within 30 calendar days, the holder may demand payment of the Secretary. Upon receipt by the Secretary of a demand for payment from the holder, the Secretary shall pay the holder the amounts lawfully demanded within 60 calendar days of the date of such demand. The Secretary shall make such payment regardless of whether the nonreceipt of the payment by the holder is due to a default by the borrower or the nontransmittal by the lender of the borrower's payment to the holder.

(b) Subsequent to a demand for payment by any holder under this section, the lender shall, within 10 calendar days, furnish to the Secretary an accounting of all payments received by the lender and all payments made to any holder in connection with the respective loan.

§ 300.82 Liquidation.

(a) After borrower default has occurred, and demand for payment has been made upon the Secretary, as provided in § 300.80(b) (1) and (2), or in the event that the Secretary and the lender agree that default has occurred, the lender shall, in consultation with the Secretary, prepare a plan for liquidation of the assets pledged as collateral to secure the loan. When the liquidation plan has been approved by the Secretary, the lender shall proceed to take the necessary steps under applicable law to foreclose upon all of the collateral securing the loan, and to sell the collateral for the highest attainable value under the circumstances. Provisions shall be set forth in the guarantee for notice to the Secretary of the sale of collateral, expenses incurred in such sale, and other matters pertaining to the method of handling the disposition of such collateral in a coordinated manner between the Secretary and the lender.

(b) The lender shall give a full accounting of the sale of assets made pursuant to the plan of liquidation, and shall serve in a fiduciary capacity for the benefit of the parties having

an interest in the proceeds of the sale of the assets.

(c) No action taken by the lender in the liquidation of any assets pledged by the borrower shall affect the rights of any party, including the Secretary, having an interest in the loan to pursue, jointly or severally, to the extent provided in the loan agreement, legal action against the borrower, or other liable parties, for any deficiencies owing on the guaranteed balance after application of the proceeds received upon liquidation.

(d) Funds received by the lender as a result of liquidation actions shall be applied as follows:

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation process, and as set forth in the liquidation plan; and

(2) Second, distributed among the legal owners of interests in the loan; pro-rated in accordance with their relative percentage ownership of the loan.

(e) In the event the Secretary deems it necessary or desirable to protect or further the interest of the United States in connection with the liquidation of collateral or recovery of deficiencies due under the loan, the Secretary shall take such action as may be appropriate under the circumstances.

(f) Nothing in this section shall preclude the Secretary from purchasing the lender's interest in the project upon liquidation.

§ 300.90 Disclosure.

Subject to the requirements of law, and applicable regulations, information such as trade secrets, commercial and financial information, geological, geophysical, and geographical information, and data (including maps) concerning mine sites, which the borrower or the lender submits to DOE in writing during the preliminary discussions, or at any other time throughout the duration of the project, on a privileged or confidential basis, will not be publicly disclosed by DOE without prior notification to the submitter. Any submitter asserting that information is privileged or confidential shall appropriately identify and mark such information.

§ 300.92 Noninterference with Federal, State, and local requirements.

Nothing in this regulation shall be construed to modify requirements imposed on the borrower or the lender by Federal, State, or local government agencies in connection with permits, licenses, or other authorizations to conduct or finance any project.

§ 300.93 Appeals.

The guarantee shall include a provision which specifies that any dispute concerning a question of fact arising under the guarantee shall be decided in writing by the DOE official, or his successor, executing the guarantee. The borrower or the lender, as appropriate, may, within 7 calendar days from receipt of any such decision, request the DOE official to reconsider any such decision. If not satisfied with this final decision, the borrower or the lender, upon receipt of such written decision, may appeal the decision within 30 calendar days, in writing, to the Chairman, Energy Board of Contract Appeals (EBCA), Department of Energy, Washington, D.C. 20545. That Board, when functioning to resolve such loan guarantee disputes, shall proceed in the same general manner as when it presides over appeals involving contract disputes. The decision of the Board with respect to such appeals shall be the final decision of the Secretary.

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AUTHORITY: Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319) (15 U.S.C. 791 et seq.), as amended by Pub. L. 94-163; Pub. L. 95-70; Pub. L. 95-91; and Pub. L. 95-620; Federal Energy Administration Act of 1974 (Pub. L. 93-275) (15 U.S.C. 761 et seq.), as amended by Pub. L. 94-385; and Pub. L. 95-91; Powerplant and Industrial Fuel Use Act of 1978 (Pub. L. 95-620) (42 U.S.C.A. 8301 et seq.) E.O. 11790 (39 FR 23185) E.O. 12009, 42 FR 46267.

SOURCE: 45 FR 67584, Oct. 10, 1980, unless otherwise noted.

Subpart A—General Provisions

§ 303.1 Purpose and scope.

(a) Part 303 establishes the procedures to be utilized and identifies the sanctions that are available in proceedings before the Department of Energy pursuant to the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (15 U.S.C. 791 et seq.)

(b) This subpart defines certain terms and establishes procedures that are applicable to each proceeding described in this part.

§ 303.2 Definitions.

As used in the part, the term:

"Action" means an order, or modification or rescission thereof, interpretation, notice of probable violation, or ruling issued, or a rulemaking undertaken by DOE, unless otherwise defined in this part.

"Aggrieved", for purposes of administrative proceedings means a person with an interest sought to be protected under the FEAA or ESECA who is adversely affected by an order or interpretation issued by DOE.

"Air pollution requirement" means any emission limitation, schedule or timetable for compliance, or other re-

quirement, which is prescribed under any Federal, State, or local law or regulation, including the Clean Air Act, as amended, (except for any requirement prescribed under section 113(d), section 110(a)(2)(F)(v), or section 303 of such Act (42 U.S.C. 7413, 7410(a)(2)(F)(v) and 7603, respectively)), and which limits stationary source emissions resulting from combustion of fuels (including a prohibition on, or specification of, the use of any fuel of any type, grade, or pollution characteristic).

"Clean Air Act" means the Clean Air Act, as amended, 42 U.S.C. 7401 et seq. (1970).

"Coal" includes coal derivatives.

"Combined cycle unit" means an electric power generating unit that consists of a combination of one or more combustion gas turbine units and one or more steam turbine units with the required energy input of the steam turbine(s) provided by and approximately matched to the energy in the exhaust gas from the combustion turbine unit(s). Use of small amounts of supplemental firing for the steam turbine does not preclude the unit from being a combined cycle unit.

"Combination gas turbine" means an electric power generating unit that is a combination of a rotary engine driven by a gas under pressure that is created by the combustion of a fuel, usually natural gas or a petroleum product, with an electric power generator driven by such engine.

"Conference" means an informal meeting, incident to any proceeding between DOE and any person aggrieved by that proceeding.

"Construction order" means a directive issued by DOE pursuant to section 2(c) of ESECA (15 U.S.C. 792(c)) that requires a powerplant or major fuel burning installation in the early planning process (other than a combustion gas turbine or combined cycle unit) to be designed and constructed to be capable of using coal as its primary energy source.

"Delayed compliance order" means an extension issued by the Administrator of EPA in accordance with section 113(d)(5) of the Clean Air Act (42 U.S.C. 7413(d)) as a result of which a powerplant or major fuel burning in-

stallation shall not, until January 1, 1986, be prohibited, by reason of the application of any air pollution requirements, from burning coal which is available to such source, except as otherwise provided in section 113(d) of that Act (42 U.S.C. 7413(d)).

"Dispatching system" means (1) an integral group of powerplants within a geographical power pool for which there is centralized control of power generation, scheduling, and transmission; or (2) where there is no such integral power system, that powerplant or group of powerplants determined by DOE, in consultation with the Federal Energy Regulatory Commission, to constitute a power generation system sufficient in scope that DOE may make a reliability finding within the meaning of ESECA.

"DEOA" means the Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101 et seq. (1977).

"DOE" means the Department of Energy, including the Secretary of Energy or his designee.

"Duly authorized representative" means a person who has been designated to appear before DOE in connection with a proceeding on behalf of a person interested in or aggrieved by that proceeding. Such appearance may consist of the submission of applications, petitions, requests, statements, memoranda of law, other documents, or of a personal appearance, verbal communication, or any other participation in the proceeding.

"Early planning process" (i) in the case of powerplants, commences 10 years prior to the planned commencement of the sale or exchange of electric power by a powerplant and terminates with commencement of the driving of the foundation piling, or the equivalent foundation structural event, in accordance with final drawings for the main boiler of the powerplant which were approved prior to commencement of such structural event; and (ii) in the case of major fuel burning installations, commences with completion of the preliminary feasibility study and terminates when the major fuel burning installation can no longer be ordered to be designed and constructed so as to be capable of burning coal as its primary energy

source without suffering significant financial or operational detriment due to the impairment of prior commitments. Typically, such a termination point will coincide with the completion of the major fuel burning installation's foundation, or the equivalent foundation structural event, in accordance with final drawings for the major fuel burning installation which were approved prior to the commencement of such structural event.

"EPA" means the Environmental Protection Agency.

"ERA" means the Economic Regulatory Administration of the Department of Energy.

"ESECA" means the Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319) (15 U.S.C. 791 et seq.), as amended by Pub. L. 94-163; Pub. L. 95-70; Pub. L. 95-91; and Pub. L. 95-620.

"Exception" means the waiver or modification of the requirements of a regulation, ruling or generally applicable requirement under a specific set of facts.

"Exemption" means the release from the obligation to comply with an entire part, or subpart thereof, of Parts 303 or 305, of this chapter.

"FEAA" means the Federal Energy Administration Act of 1974 (Pub. L. 93-275) (15 U.S.C. 761 et seq.), as amended by Pub. L. 94-332; Pub. L. 94-385; Pub. L. 95-70; and Pub. L. 95-91.

"Federal legal holiday" means New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day appointed as a national holiday by the President or the Congress of the United States.

"FUA" means the Powerplant and Industrial Fuel Use Act of 1978 (Pub. L. 95-620) (42 U.S.C.A. 8301 et seq.), which became effective on May 9, 1979.

"Interpretation" means a written statement issued by the General Counsel or his delegate, in response to a written request, that applies the regulations, rulings, and other precedents previously issued, to the particular facts of a prospective or completed act or transaction.

"Interested person" includes members of the public, as well as any person with an interest sought to be protected under ESECA.

"Major fuel burning installation" means an installation or unit other than a powerplant that has or is a fossil-fuel fired boiler, burner, or other combustor of fuel, or any combination thereof at a single site, and includes any person who owns, leases, operates or controls any such installation or unit.

"Natural gas" includes dry gas and casinghead gas.

"Notice of effectiveness" or "NOE" means (a) a written statement issued by DOE to an existing powerplant or major fuel burning installation, subsequent to certification by EPA pursuant to section 112(b) of the Clean Air Act Amendments of 1977 (Pub. L. 95-95), advising the powerplant or installation of the date that the prohibition order applicable to it becomes effective; or (b) a written statement issued by DOE to a new powerplant or major fuel burning installation advising the powerplant or installation of the date that the construction order applicable to it becomes effective.

"Notice of probable violation" means a written statement issued to a person by DOE that states one or more alleged violations of the provisions of Parts 303 or 305 of this chapter or any order issued pursuant to section 2 of ESECA.

"Order" means a written directive or verbal communication of a written directive, if promptly confirmed in writing, issued by DOE pursuant to Part 303 or 305 of this chapter or section 2 of ESECA. An order may be issued in response to an application, petition or request for DOE action or in response to an appeal from another order, or it may be a remedial order or other directive issued by DOE on its initiative. A notice of probable violation is not an order. For purposes of this definition a "written directive" shall include telegrams, telecopies and similar transmissions.

"Person" means any association, firm, company, corporation, estate, individual, joint-venture, partnership, or sole proprietorship or any other entity however organized including charita-

ble, educational, or other eleemosynary institutions, and the Federal Government, including corporations, departments, Federal agencies, and other instrumentalities, and State and local governments, and includes any officer, director, owner or duly authorized representative thereof. DOE may, in regulations and in any forms issued in this part, treat as a person:

(a) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls,

(b) A parent and its consolidated entities,

(c) An unconsolidated entity, or

(d) Any part of a person.

"Petroleum product" means crude oil, residual fuel oil or any refined petroleum product, as that last term is defined in section 3(5) of the Emergency Petroleum Allocation Act of 1973 as amended (Pub. L. 93-159).

"Powerplant" means a fossil-fuel fired steam electric generating unit that produces electric power for purposes of sale or exchange, and includes any person who owns, leases, operates or controls any such unit.

"Preliminary feasibility study" means that analysis, formal or otherwise, which concluded that new, additional, or replacement capacity appears to be required and which precedes the managerial decision to initiate the design of a major fuel burning installation.

"Primary energy source" means with respect to a powerplant or major fuel burning installation that utilizes a fossil-fuel, the fuel that is or will be used for all purposes except for the minimum amounts required for start-up, testing, flame stabilization and control, and process fuel use, and except, with regard to powerplants or major fuel burning installations issued prohibition orders that also are issued delayed compliance order by EPA in accordance with Section 113 of the Clean Air Act (42 U.S.C. 7413), for such minimum amounts of fuel required to enable such powerplant or major fuel burning installation to comply with applicable primary standard conditions prescribed by EPA in accordance with 40 CFR 55.04: *Provided*, Such minimum amounts of fuel may be used only when such primary

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standard conditions include the utilization of intermittent control systems and only during such temporary periods as use of the minimum amounts is absolutely necessary to meet the terms of the primary standard conditions relating to use of intermittent control systems.

"Proceeding" means the process and activity, and any part thereof, instituted by DOE, either on its initiative or in response to an application, complaint, petition or request submitted by a person, that may lead to an action by DOE.

"Process fuel use" means that fuel use for which alternate fuels are not technically feasible such as in applications requiring precise temperature control and precise flame characteristics.

"Prohibition order" means a directive issued by DOE pursuant to sections 2(a) and (b) of ESECA (15 U.S.C. 792(a) and (b)) that prohibits a powerplant or major fuel burning installation from burning natural gas or petroleum products as its primary energy source.

"Remedial order" means a directive issued by DOE requiring a person to cease a violation or to eliminate or to compensate for the effects of a violation, or both.

"Ruling" means an official interpretative statement of general applicability issued by DOE General Counsel and published in the FEDERAL REGISTER, that applies DOE regulations to a specific set of circumstances.

"Stationary source fuel or emission limitations" means any emission limitation, schedule or timetable of compliance, or other requirement, which is prescribed under the Clean Air Act (other than sections 113, 111(b), 112, or 303 (42 U.S.C. 7413, 7411, 7412, and 7603 respectively)) or contained in an applicable implementation plan (other than a requirement imposed under authority described in section 110(a)(2)(F)(v) of such Act (42 U.S.C. 7410(a)(2)(F)(v)), and which limits, or is designed to limit, stationary source emissions resulting from combustion of fuels, including a prohibition on, or specification of, the use of any fuel of any type, grade, or pollution characteristic.

"United States", when used in the geographic sense, means the several States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

Throughout this part the use of a word or term in the singular shall include the plural and the use of the male gender shall include the female gender.

§ 303.3 Appearance before DOE.

(a) A person may make an appearance and participate in any proceeding described in this part on his own behalf or by a duly authorized representative. Personal appearances are at the discretion of DOE, except as required by ESECA, DEOA, or the FEAA. Any application, appeal, petition, request or complaint filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless a DOE form requires otherwise. Falsification of this certification will subject the person to the sanctions stated in 18 U.S.C. 1001 (1970).

(b) DOE may deny, temporarily or permanently, the privilege of participating in proceedings, including oral presentation, to any individual who is found by DOE—

(1) To have made false or misleading statements, either verbally or in writing;

(2) To have filed false or materially altered documents, affidavits or other writings;

(3) To lack the specific authority to represent the person seeking a DOE action; or

(4) To have engaged in or to be engaged in contumacious conduct that substantially disrupts a proceeding.

§ 303.4 Filing of documents.

(a) Any document, including, but not limited to, an application, request, complaint, petition and other documents submitted in connection therewith, filed with DOE under Part 303 or Part 305 of this chapter is considered to be filed when it has been received by DOE National Office. Documents transmitted to DOE shall be addressed as required by § 303.12. All

documents and exhibits submitted become part of a DOE file and will not be returned.

(b) Notwithstanding the provisions of paragraph (a) of this section, if transmitted by registered or certified mail and addressed to the appropriate office, the following are considered to be filed upon mailing:

- (1) An appeal,
- (2) a response to a denial of an appeal or application for modification or rescission of an order in accordance with § 303.107(a)(3) of this chapter and § 303.145(a)(3), respectively,
- (3) an application for modification or rescission of a prohibition order as a result of significantly changed circumstances that occurred during the interval between issuance of the prohibition order and service of the NOE,
- (4) an application for the quashing or modification of a subpoena,
- (5) a reply to a notice of probable violation,
- (6) the appeal of a remedial order or remedial order for immediate compliance,
- (7) a response to denial of a claim of confidentiality, or
- (8) a comment submitted in connection with any proceeding.

(c) Hand-delivered documents to be filed with the Office of Hearings and Appeals shall be submitted to Room 8002 at 2000 M Street, NW., Washington, D.C. All other hand-delivered documents to be filed with the DOE National Office shall be submitted at the address provided in § 303.12.

(d) Documents received after regular business hours are deemed to have been filed on the next regular business day. Regular business hours for the DOE National Office are 8 a.m. to 4:30 p.m.

§ 303.5 Computation of time.

(a) *Days.* (1) Except as provided in paragraph (b) of this section, in computing any period of time prescribed or allowed by these regulations or by an order of DOE, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or Federal legal holiday, in which event

the period runs until the end of the next day that is neither a Saturday, Sunday, nor a Federal legal holiday.

(2) Saturdays, Sundays or intervening Federal legal holidays shall be excluded from the computation of time when the period of time allowed or prescribed is 7 days or less.

(b) *Hours.* If the period of time prescribed in an order issued by DOE is stated in hours rather than days, the period of time shall begin to run upon actual notice of such order, whether by verbal or written communication, to the person directly affected, and shall run without interruption, unless otherwise provided in the order, or unless the order is stayed, modified, suspended or rescinded. When a written order is transmitted by verbal communication, the written order shall be served as soon thereafter as is feasible.

(c) *Additional time after service by mail.* Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time after issuance to such person of an order, notice, interpretation or other document and the order, notice, interpretation or other document is served by mail, 3 days shall be added to the prescribed period.

§ 303.6 Extension of time.

When a document is required to be filed within a prescribed time, an extension of time to file may be granted by the office with which the document is required to be filed upon good cause shown.

§ 303.7 Service.

(a) All orders, notices, interpretations or other documents required to be served under this part shall be served personally or by registered or certified mail or by regular United States mail (only when service is effected by DOE), except as otherwise provided.

(b) Service upon a person's duly authorized representative shall constitute service upon that person.

(c) Service by registered or certified mail, or, if by DOE, by regular mail is complete upon mailing. Official

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United States Postal Service receipts from such registered or certified mailing shall constitute *prima facie* evidence of service.

§ 303.8 Subpoenas; witness fees.

(a) The Secretary of DOE, his duly authorized agent, DOE General Counsel, or the agency official designated to conduct a hearing or public hearing convened in accordance with Subpart N of this part, may sign and issue subpoenas either on his own initiative or upon the request of any person participating in that proceeding, which request shall be supported by an adequate showing that the information sought will materially advance a proceeding.

(b) A subpoena may require the attendance of a witness, or the production of documentary or other tangible evidence in the possession or under the control of the person served, or both.

(c) A subpoena may be served personally by any person who is an interested person and is not less than 18 years of age, or by certified or registered mail. For purposes of this paragraph, "interested person" means a person who is participating directly in the proceeding with respect to which the subpoena is issued.

(d) Service of a subpoena upon the person named therein shall be made by delivering a copy of the subpoena to such person and by tendering the fees for one day's attendance and mileage as specified by paragraph (f) of this section. When a subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service. Delivery of a copy of a subpoena and tender of the fees to a natural person may be made by handing them to the person; leaving them at his office with the person in charge thereof; leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; by mailing them by registered or certified mail to him at his last known address; or by any method whereby actual notice is given to him and the fees are made available prior to the return date. When the person to be served is not a

natural person, delivery of a copy of the subpoena and tender of the fees may be effected by handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person, or by mailing them by registered or certified mail to such representative at his last known address or by any method whereby actual notice is given to such representative and the fees are made available prior to the return date. If any person is an entity with offices and operations in more than one jurisdiction, such person may designate one address to which any subpoena may be served by filing such designation with the General Counsel at the address specified in § 303.12.

(e) The original subpoena bearing a certificate of service shall be filed with the DOE office with the responsibility for the proceeding in connection with which the subpoena was issued.

(f) A witness subpoenaed by DOE shall be paid the same fees and mileage as would be paid to a witness in a proceeding in the district courts of the United States. The witness fees and mileage shall be paid by the person at whose instance the subpoena was issued.

(g) Notwithstanding the provisions of paragraph (f) of this section, and upon request, the witness fees and mileage shall be paid by DOE when it is shown that:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and

(2) The person at whose instance the subpoena was issued would suffer a serious hardship if required to pay the witness fees and mileage. The designated DOE official issuing the subpoena shall make the determination required by this paragraph.

(h)(1) Any person to whom a subpoena is directed may, prior to the time specified therein for compliance, but in no event more than 10 days after the date of service of such subpoena, apply to the designated DOE official who issued the subpoena, or if he is unavailable, to the Secretary of DOE, to quash or modify such subpoena. The application shall contain a brief statement of the reasons relied upon

in support of the action sought therein.

(2) The Secretary of DOE or such other designated DOE official specified in paragraph (h)(1) of this section may (i) deny the application, (ii) quash or modify the subpoena, or (iii) condition the denial or granting of the application to quash or modify the subpoena upon the satisfaction of certain just and reasonable requirements. Such denial may be summary.

(3) While the Secretary of DOE or such other designated DOE official specified in paragraph (h)(1) of this section is considering the application to quash or modify the subpoena, a stay of the obligation to comply with the subpoena may be issued in accordance with Subpart I.

(i) If there is a refusal to obey a subpoena served upon any person under the provisions of this section, DOE may request the Attorney General to seek the aid of the District Court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce the subpoenaed documents before the agency, or both.

§ 303.9 General filing requirements.

(a) *Purpose and scope.* The provisions of this section shall apply to all documents required or permitted to be filed with DOE.

(b) *Signing.* All applications, petitions, requests, appeals, complaints, comments, or any other documents that are required to be signed shall be signed by the person filing the document or a duly authorized representative. Any application, petition, request, appeal, complaint, comment or other document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative, unless a DOE form otherwise requires. (A false certification is unlawful under the provisions of 18 U.S.C. 1001 (1970).)

(c) *Labeling.* An application, petition, or other request for action by DOE should be clearly labeled according to the nature of the action involved both on the document and on

the outside of the envelope in which the document is transmitted.

(d) *Obligation to supply information.* (1) A person who files an application, petition, complaint, appeal or other request for action and other documents relevant thereto, or to whom a prohibition order or a construction order is issued, is under a continuing obligation during the proceeding to provide the DOE with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, complaint, appeal or request for action or document required to be submitted that is subsequently filed by that person with any DOE office or EPA office if such document pertains to this Part 303 or Part 305, Part 307, Part 309, or Part 215 of this chapter, or Subpart A of 40 CFR Part 55.

(2) With respect to documents required to be filed with EPA in accordance with Subpart A of 40 CFR Part 55, notice of the filing of such documents shall be filed with DOE within 5 days of their filing with EPA.

(e) *The same or related matters.* A person who files an application, petition, complaint or other request for action by the DOE shall state whether, to the best knowledge of that person, the same or related issue, act or transaction has been or presently is being considered or investigated by any DOE office, other Federal agency, department or instrumentality; or by a state or municipal agency or court; or by any law enforcement agency, including, but not limited to, a consideration or investigation in connection with the proceeding described in this part or under Subpart A of 40 CFR Part 55. In addition, the person shall state whether contact subsequent to the issuance of this Part 303 or Part 305 or Part 215 of this chapter has been made by the person or one acting on his behalf with any person who is employed by DOE or EPA with regard to the same issue, act or transaction arising out of the same factual situation; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of

the contact; and the date or dates of the contract.

(f) *Request for confidential treatment.* (1)(i) If any person filing a document with DOE claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552 (1966)), as amended, or is information referred to in 18 U.S.C. 1905 (1970), or is otherwise exempt by law from public disclosure, and if such person requests DOE not to disclose such information, such person shall file together with the document a second copy of the document from which has been deleted the information for which such person wishes to claim confidential treatment. The person shall indicate in the original document that it is confidential or contains confidential information and shall file a concise statement specifying the justification for nondisclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information or is covered by 18 U.S.C. 1905, such person shall include a concise statement specifying why such information is privileged or confidential.

(ii) If the person filing a document does not submit a second copy of the document with the confidential information deleted, DOE may assume that there is no objection to public disclosure of the document in its entirety.

(2) DOE retains the right to make its own determination with regard to any claim of confidentiality. Notice of the decision by DOE to deny such claim, in whole or in part, shall be given to a person making such claim no less than seven (7) calendar days prior to the intended public disclosure of the information in question, as prescribed by 10 CFR 1004.11(e) (DOE's Freedom of Information Act regulations).

(3) This paragraph (f) of this section does not apply where information is being submitted on a DOE form which contains its own instructions as to requests for confidential treatment of information provided therein.

(g) *Separate applications, petitions or requests.* Each application, petition or request for DOE action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act or transaction, or are submitted in connection with the same proceeding.

§ 303.10 Effective date of orders.

(a) Any order issued by DOE under Parts 303 or 305 of this chapter, except a prohibition order as stated in paragraph (b) of this section is effective as against all persons having actual notice thereof upon publication in the *FEDERAL REGISTER*, in accordance with its terms, unless it is stayed, modified, suspended, or rescinded. The order is deemed to be issued on the date on which it is signed by an authorized representative of DOE, unless the order provides otherwise.

(b)(1) A prohibition order shall not become effective before certain action by EPA, actions by DOE as described in § 305.9 of this chapter, and service by DOE upon the affected powerplant or major fuel burning installation of an NOE in accordance with § 305.7 of this chapter. A prohibition order or NOE is deemed to be issued on the date on which it is signed by an authorized representative of DOE.

(2) A construction order or NOE is deemed to be issued on the date, as specified in the order or notice, on which it is signed by an authorized representative of DOE.

§ 303.11 Order of precedence.

If there is any conflict or inconsistency between the provisions of this part and any other provisions of this chapter, the provisions of this part shall control with respect to procedure.

§ 303.12 Addresses for filing documents with DOE.

(a)(1) Send all petitions, forms, written communications, or other documents not included in paragraph (a)(2) of this section to the following address: Economic Regulatory Administration, Case Control Unit (Fuel Use

Act), Box 4629, Room 3214, 2000 M Street, NW., Washington, D.C. 20461.

(2) Send all requests for interpretations and interpretative rulings to the following address: Assistant General Counsel for Interpretations and Rulings, 1000 Independence Avenue, SW., Forrestal Building, Washington, D.C. 20585.

(3) All other documents to be filed with the Office of the General Counsel shall be addressed as follows: Office of the General Counsel, Department of Energy, Attention: (Name of person to receive document, if known, and/or labeling as specified in § 303.9(c)), Washington, D.C. 20585.

(b) The DOE National Office has facilities for the receipt of transmission via TWX and FAX to its offices at 1000 Independence Avenue, SW. (Forrestal) and 2000 M Street, NW. (The FAX machines are 3M full duplex 4 or 6 minute (automatic)). For purposes of these regulations, all your transmissions should be to the facilities at 2000 M Street, NW., except those to be sent to the Office of the General Counsel, which should be transmitted to the facilities located at Forrestal.

FAX Numbers:

(202) 252-5100 (3M) (Forrestal)
(202) 653-3613 (3M) (2000 M St.)

TWX Numbers:

(710) 822-0176 (Forrestal)
(710) 822-9454 (2000 M St.)

(c) Documents to be filed with the Office of Hearings and Appeals, as provided in this part or otherwise, shall be addressed as follows: Office of Hearings and Appeals, Department of Energy, Attn: (Name of person to receive document, if known, and/or labeling as specified in § 303.9(c)), Washington, D.C. 20461.

§ 303.13 Public Information Office/Freedom of information reading room.

(a) DOE will make available at Room B-110, 2000 M Street, NW., Washington, D.C. for public inspection and copying:

(1) Each rule, order or other administrative determination that is issued as a final agency action on a matter before ERA;

(2) Any written comments received from interested persons in connection

with issuance of a rule, order, or other determination, modifications or rescissions, or stays of rules, or determinations, and verbatim transcripts of any oral comments made at public hearings where a transcript was made;

(3) Any comments received during each rulemaking proceeding and a verbatim transcript of any public hearings that may have been held in any rulemaking proceeding; and

(4) Any other information required by statute to be made available for public inspection and copying, and any information that ERA determines should be made available to the public.

(b) There shall be made available at the Freedom of Information Reading Room (Forrestal Building, Room 5B-180, 1000 Independence Avenue, SW., Washington, D.C.) for public inspection and copying:

(1) The written comments received from interested persons in connection with issuance of prohibition orders or construction orders, or the modification or rescission thereof, if applicable, with a verbatim transcript of any oral comments made at a public hearing held prior to issuance of an order;

(2) The comments received during each rulemaking proceeding, with a verbatim transcript of the public hearing, if such a public hearing was held; and

(3) Any other information required by statute to be made available for public inspection and copying, and any information that DOE determines should be made available to the public through display in the Freedom of Information Reading Room.

§ 303.14 Petitions for special redress, relief, and extraordinary assistance.

Petitions that seek special redress, relief or other extraordinary assistance apart from or in addition to the proceedings and procedures described in this part, including those petitions based on an assertion that DOE is not complying with the FEAA, ESECA, DEOA, FUA, DOE regulations, orders, rules, or otherwise, shall be filed with the Office of Hearings and Appeals in accordance with Subpart R of Part 205 of this chapter.

Subpart B—Prohibition Orders

§ 303.37 Notice of Effectiveness.

(a) Prohibition orders shall not become effective until the certification procedures described in this paragraph are satisfied.

(b) A prohibition order shall not become effective (1) until either (i) the Administrator of EPA certifies to DOE in accordance with section 112(b) of the Clean Air Act Amendments of 1977 (Pub. L. 95-95) that the powerplant or major fuel burning installation will be able on and after July 1, 1979 to burn coal and to comply with all applicable air pollution requirements without a delayed compliance order, or (ii) the date which the Administrator of EPA certifies as the earliest date that the powerplant or major fuel burning installation will be able to comply with all applicable requirements of section 113 of the Clean Air Act, as amended (42 U.S.C. 7413); and (2) until DOE has taken the actions described in § 305.9 of this chapter and has served the affected powerplant or major fuel burning installation an NOE. No order shall be effective during any period certified by the Administrator of EPA under section 113(b) of that Act (42 U.S.C. 7413(d)).

(c) Upon receipt of certification by the Administrator of EPA in accordance with the procedures described in paragraph (c)(1) of this section, DOE may issue an NOE.

§ 303.38 Appeal.

(a) Any person aggrieved by a prohibition order may file an appeal with the DOE Office of Hearings and Appeals after issuance of an NOE. The appeal shall not be filed prior to issuance by DOE of the NOE and shall be filed within 30 days after the service of such notice.

(b) If a powerplant or major fuel burning installation applies for a modification or rescission of a prohibition order, in accordance with Subpart J of this part, any appeal of such prohibition order shall be suspended until 30 days after an order has been issued in accordance with Subpart J or until 30 days from the date on which such powerplant or major fuel burning in-

stallation may treat that application as being denied in all respects.

(c) There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H of this part and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

Subparts C-D—[Reserved]

Subpart E—Exception

§ 303.70 Purpose and scope.

(a) This subpart establishes the procedures for applying for an exception from a regulation, ruling or generally applicable requirement based on an assertion of serious hardship, inequity or unfair distribution of burdens and for the consideration of such application by DOE.

(b) A request for an interpretation or other specific action which includes, or could be construed to include, an application for an exception may be treated solely as a request for an interpretation or other action, and processed as such by DOE.

(c) The filing of an application for an exception shall not constitute grounds for non-compliance with the requirements of the regulation, ruling or generally applicable requirement from which an exception is sought, unless a stay has been issued in accordance with Subpart I of this part.

§ 303.71 What to file.

(a) A person filing under this subpart shall file an "Application for Exception (ESECA)" which should be clearly labeled as such on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted under this subpart, the procedures set out in § 303.9(f) shall apply.

§ 303.72 Where to file.

All applications for exception shall be filed with the Office of Hearings and Appeals at the address provided in § 303.12.

§ 303.73 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, or a copy from which confidential information has been deleted in accordance with § 303.9(f), to each person who is reasonably ascertainable by the applicant as a person who will be aggrieved by DOE action sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the DOE Office of Hearings and Appeals within 10 days of service of such application. The application filed with DOE shall include certification to DOE that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent.

DOE may require the applicant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER.

(c) DOE shall serve notice on any other person readily identifiable by DOE as one who will be aggrieved by the DOE action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of such notice.

(d) Any person submitting written comments to DOE with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 303.9(f) to the applicant. The person shall certify to DOE that he has complied with the requirements of this paragraph. DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

(e) At regular intervals, DOE shall publish a list of all persons who have applied for an exception under this subpart, with a brief description of the factual situation and the relief requested.

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(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the act or transaction that would be affected by the requested action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference or hearing regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference or hearing is held when it will be most beneficial. The request and DOE's determination regarding it shall be made in accordance with Subpart N of this part, which determination is within DOE's discretion.

(c) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE and

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EPA ruling, regulations, interpretations and decisions on appeals and exceptions relied upon to support the particular action sought therein.

(d) The application shall specify the exact nature and extent of the relief requested.

§ 303.75 DOE evaluation.

(a) *Processing.* (1) DOE may initiate an investigation of any statement in an application or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions from third persons relevant to any application or other document: *Provided*, That the applicant is afforded an opportunity to respond to all relevant third person submissions. In evaluating an application or other documents, DOE may conduct its own investigation and consider any other source of information. DOE on its initiative may convene a hearing or conference, if, in its discretion, it considers that such hearing or conference will advance its evaluation of the application.

(2) If DOE determines that there is insufficient information upon which to base a decision and if upon request necessary additional information is not submitted by the applicant, DOE may dismiss the application without prejudice. If the failure to supply additional information in repeated or willful, DOE may dismiss the application with prejudice. If the applicant fails to provide the notice required by § 303.73 DOE may dismiss the application without prejudice.

(b) *Criteria.* (1) DOE shall only consider an application for an exception when it determines that a more appropriate proceeding is not provided by this part.

(2) An application for an exception may be granted to alleviate or prevent special hardship, inequity or unfair distribution of burdens.

(3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

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§ 303.76 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, DOE shall issue an order either granting or denying the application.

(b) The order shall include a written statement setting forth the pertinent facts and the legal basis upon which the order is issued. The order shall provide that any person aggrieved thereby may file an appeal with the DOE Office of Hearings and Appeals in accordance with Subpart H of this part.

(c) DOE shall serve a copy of the order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by DOE as one who is aggrieved by such order. A copy of each order, with such modification as is necessary to insure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, will be on file in the public docket room described in § 303.13. If such copy contains information that has been claimed by an applicant or other person to be confidential, notice of DOE's intention to place a copy in the docket room and an opportunity to respond shall be given to such person no less than five days prior to its placement in such room. The Office of Hearings and Appeals shall publish periodically a digest of all orders issued.

§ 303.77 Timeliness.

(a) When DOE has received all substantive information deemed necessary to process an application filed under this subpart, DOE shall serve notice of that fact upon the applicant and all other persons who received notice of the proceeding pursuant to the provisions of § 303.73; and if DOE fails to take action on the application within 90 days of serving such notice, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in this subpart.

(b) Notwithstanding the provisions of paragraph (a) of this section, if DOE fails to take action on the appli-

cation within 150 days from the filing of the application, the applicant may treat it as having been denied in all respects and may appeal therefrom as provided in this subpart.

§ 303.78 Appeal.

Any person aggrieved by an order issued by DOE under this subpart may file an appeal with the DOE Office of Hearings and Appeals in accordance with Subpart H of this part. The appeal must be filed within 30 days of service of the order from which the appeal is taken or within 30 days of the date on which the applicant can treat the application as being denied in all respects. There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H of this part and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

Subpart F—Exemption

§ 303.80 Purpose and scope.

This subpart establishes the procedures for filing an application for exemption and the consideration of such by DOE. The applicant must be seeking an exemption from no less than an entire part, or subpart of this chapter.

§ 303.81 Procedures.

(a) An exemption may be effected only by amendment to the regulations. Although an application for an exemption is a request for a rulemaking, the application is not subject to the procedures of Subpart M of this part. If a rulemaking proceeding is convened, however, it shall be held in accordance with Subpart M of this part.

(b) An application for an exemption shall be submitted separate and apart from any other application, appeal, petition or other request submitted in accordance with this part. If an application for exemption is included with any other application, appeal petition, or other request, the application for exemption will not be processed, nor will it be severed for separate consideration.

§ 303.82 What to file.

A person filing under this subpart shall file an "Application for Exemption (ESECA)" which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart.

§ 303.83 Where to file.

An application for exemption shall be filed with the Office of Hearings and Appeals at the address provided in § 303.12.

§ 303.84 Contents.

The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, acts or transactions that are the subject of the application and to the DOE action sought. The application shall identify the part or parts, or subparts thereof, of this chapter from which the exemption is sought; describe the business or other reason that would justify such exemption; identify the persons or classes of persons and acts or transactions that would be aggrieved or affected by such exemption and describe the adverse impact; describe the benefit to the person making the application, or others, that would result if the exemption were effected; and explain the reasons why the action sought by the application cannot be accomplished by any other proceeding provided in this part. Upon request, the applicant shall submit copies of relevant contracts, agreements, leases, instruments, and other documents that are representative of those that would be affected by the granting of the requested exemption.

§ 303.85 DOE evaluation.

(a) *Processing.* All applications for exemption shall be evaluated by DOE to determine if the institution of a rulemaking proceeding is warranted and if the DOE action sought by the applicant could more appropriately be considered in any other proceeding

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provided by this part. DOE may initiate an investigation of any statement in an application or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions from third persons relevant to any application for exemption or other document provided that the person making the request is afforded an opportunity to respond to all relevant third person submissions other than written comments or oral presentations in response to a rulemaking. In evaluating an application or other document, DOE may conduct its own investigation and consider any other source of information.

(b) *Criteria.* (1) Rulemaking proceedings for the purpose of considering an application for exemption will be instituted only if DOE in its discretion determines that such a proceeding would be appropriate. Among the factors that DOE will evaluate in making a determination with respect to a rulemaking are—

(i) The impact that granting the exemption would have on the regulatory scheme and objectives;

(ii) The number of persons who would be exempted; and

(iii) The economic justification for such exemption.

(2) DOE may summarily deny an application for exemption if:

(i) The exemption sought is not from each or all of the parts or a subpart thereof, of this chapter;

(ii) The granting of an exemption to the person making the application would not have sufficient national impact, economic or otherwise, to warrant rulemaking proceedings for the purpose of considering an amendment to the regulations;

(iii) It is determined that the statutory criteria cannot be met; or

(iv) It is determined that another proceeding provided by this part is more appropriate.

§ 303.86 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, DOE shall issue an appropriate order. If the application is not

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denied, the order shall provide for publication of a Notice of Proposed Rulemaking regarding the application in the FEDERAL REGISTER.

(b) The order shall include a written statement setting forth the pertinent facts and legal basis upon which the order is issued. The order denying the application shall state that any person aggrieved thereby may file an appeal with the Office of Hearings and Appeals in accordance with Subpart H of this part.

§ 303.87 Timeliness.

If DOE fails to take action on any application filed under this subpart within 90 days of filing, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in this subpart.

§ 303.88 Appeal.

Any person aggrieved by an order issued by DOE under this subpart that denies an application for exemption may file an appeal with the Office of Hearings and Appeals in accordance with Subpart H of this part. The appeal must be filed within 30 days of service of the order from which the appeal is taken or within 30 days of the date on which the applicant can treat the application as being denied in all respects. There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H of this part and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

Subpart G—Interpretation

§ 303.90 Purpose and scope.

(a) This subpart establishes the procedures for the filing of a formal request for an interpretation and for the consideration of such request. Responses, which may include verbal or written responses, to general inquiries or to other than formal written requests for interpretation filed with the General Counsel or his delegate, are not interpretations and merely provide general information.

(b) A request for interpretation that includes, or could be construed to include, an application for an exception or an exemption may be treated solely as a request for interpretation and processed as such.

§ 303.91 What to file.

(a) A person filing under this subpart shall file a "Request for Interpretation (ESECA)" which should be clearly labeled as such both on the request and on the outside of the envelope in which the request is transmitted, and shall be in writing and signed by the person filing the request. The person filing the request shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart.

(b) If the person filing the request wishes to claim confidential treatment for any information contained in the request or other documents submitted under this subpart, the procedures set out in § 303.9(f) shall apply.

§ 303.92 Where to file.

A request for interpretation shall be filed with the General Counsel or his delegate at the address provided in § 303.12.

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(a) The request shall contain a full and complete statement of all relevant facts pertaining to the circumstances, acts or transactions that are the subject of the request and to DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable) and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the request. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the request.

(b) The request for interpretation shall include a discussion of all relevant authorities, including, but not limited to, DOE and EPA rulings, regulations, interpretations and decisions on appeals and exceptions relied upon to support the particular interpretation sought therein.

§ 303.94 DOE evaluation.

(a) *Processing.* (1) DOE may initiate an investigation of any statement in a request or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions from third persons relevant to any request for interpretation or other document: *Provided*, That the person making the request is afforded an opportunity to respond to all relevant third person submissions. In evaluating a request for interpretation or other document, DOE may conduct its own investigation and consider any other source of information. DOE on its own initiative may convene a conference, if, in its discretion, it considers that such conference will advance its evaluation of the request.

(2) DOE shall issue its interpretation on the basis of the information provided in the request, unless that information is supplemented by other information brought to the attention of the General Counsel during the proceeding. The interpretation shall, therefore, depend for its authority on the accuracy of the factual statement and may be relied upon only to the extent that the facts of the actual situation correspond to those upon which the interpretation was based.

(3) If DOE determines that there is insufficient information upon which to base a decision and if upon request necessary additional information is not submitted by the person requesting the interpretation, DOE may refuse to issue an interpretation.

(b) *Criteria.* (1) DOE shall base an interpretation on the FEAA, DEOA, FUA, and ESECA and the regulations and published rulings of DOE as applied to the specific factual situation.

(2) DOE shall take into consideration previously issued interpretations dealing with the same or a related issue.

§ 303.95 Decision and effect.

(a) An interpretation may be issued after consideration of the request for interpretation and other relevant information received or obtained during the proceeding.

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(b) The interpretation shall contain a written statement of the information upon which it is based and a legal analysis of and conclusions regarding the application of rulings, regulations and other precedent to the situation presented in the request.

(c) Only those persons to whom an interpretation is specifically addressed and other persons upon whom DOE serves the interpretation and who are directly involved in the same transaction or act may rely upon it. No person entitled to rely upon an interpretation shall be subject to civil or criminal penalties stated in Subpart Q of this part for any act made in reliance upon the interpretation, notwithstanding that the interpretation shall thereafter be declared by judicial or other competent authority to be invalid.

(d) DOE at any time may rescind or modify an interpretation on its initiative. Rescission or modification may be effected by notifying persons entitled to rely on interpretation that it is rescinded or modified. This notification shall include a statement of the reasons for the rescission or modification and, in the case of a modification, a restatement of the interpretation as modified.

(e) An interpretation is modified by a subsequent amendment to the regulations or ruling to the extent that it is inconsistent with the amended regulation or ruling.

(f)(1) Any person aggrieved by an interpretation may submit a petition for reconsideration to the General Counsel within 30 days of service of the interpretation from which the reconsideration is sought. There has not been an exhaustion of administrative remedies until a period of 30 days from the date of service of the interpretation has elapsed without receipt by the General Counsel of a petition for reconsideration or, if a petition for reconsideration of the interpretation has been filed in a timely manner, until that petition has been acted on by the General Counsel. However, a petition to which the General Counsel does not respond within 60 days of the date of receipt thereof, or within such extended time as the General Counsel may prescribe by written notice to the

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petitioner concerned within that 60 day period, shall be considered denied.

(2) A petition for reconsideration may be summarily denied if—

(i) It is not filed in a timely manner, unless good cause is shown; or

(ii) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the interpretation was erroneous in fact or in law, or that it was arbitrary or capricious.

(3) The General Counsel may deny any petition for reconsideration if the petitioner does not establish that—

(i) The petition was filed by a person aggrieved by an interpretation;

(ii) The interpretation was erroneous in fact or in law; or

(iii) The interpretation was arbitrary or capricious. The denial of a petition shall be a final order of which the petitioner may seek judicial review.

§ 303.96 Appeal.

There is no administrative appeal of an interpretation.

Subpart H—Appeal

§ 303.100 Purpose and scope.

(a) This subpart establishes the procedures for the filing of an administrative appeal of DOE actions taken under Subparts B, C, E, F, J, K, or P of this part and the consideration of such appeal by DOE.

(b) A person who has appeared before DOE in connection with a matter arising under Subparts B, C, E, F, J, K, or P of this part has not exhausted his administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued.

§ 303.101 Who may file.

Any person aggrieved by an order issued by DOE under Subparts B, C, E, F, J, K, or P, of this part may file an appeal.

§ 303.102 What to file.

(a) A person filing under this subpart shall file an "Appeal of Order (ESECA)" which should be clearly labeled as such both on the appeal and on the outside of the envelope in

which the appeal is transmitted, and shall be in writing and signed by the person filing the appeal. The appellant shall comply with the general filing requirements stated in § 303.9 (other than § 303.9(e), as provided in § 303.106(c)) in addition to the requirements stated in this subpart.

(b) If the appellant wishes to claim confidential treatment for any information contained in the appeal or other documents submitted under this subpart, the procedures set out in § 303.9(f) shall apply.

§ 303.103 Where to file.

The appeal of an order shall be filed with the Office of Hearings and Appeals at the address provided in § 303.12.

§ 303.104 When to file.

The time within which an appeal must be filed and, in the case of a prohibition order, the time before which an appeal cannot be filed, is stated in the appeals section of each subpart, unless a subpart describes a proceeding for which there is not an administrative appeal.

§ 303.105 Notice.

(a) The appellant shall send by United States mail a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with § 303.9(f), to each person who is reasonably ascertainable by the appellant as a person who will be aggrieved by the DOE action sought, including those who participated in the prior proceeding, except as provided in paragraphs (b) and (c) of this section. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the DOE Office of Hearings and Appeals within 10 days. The appeal filed with DOE shall include certification to DOE that the appellant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the appeal was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if an

appellant determines that compliance with paragraph (a) of this section would be impracticable, the appellant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the appeal a description of the persons or class or classes of persons to whom notice was not sent.

(c) DOE may require the appellant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the FEDERAL REGISTER. With respect to the appeal of a prohibition order, or the modification or rescission of a prohibition order or construction order as a result of significantly changed circumstances that occurred during the interval between issuance of a prohibition order and service of an NOE, DOE shall provide notice of the appeal of those orders by publication in the FEDERAL REGISTER. Such notice shall state that aggrieved persons shall have 10 days from publication of the notice to file written comments regarding the appeal.

(d) DOE shall serve notice on any other person reasonably identifiable by DOE as one who will be aggrieved by the DOE action sought and may serve notice on any other person that written comments regarding the appeal will be accepted if filed within 10 days of service of that notice, except as stated in paragraph (c) of this section with respect to prohibition orders, or the modification or rescission of prohibition or construction orders.

(e) Any person submitting written comments to DOE with respect to an appeal filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 303.9(f), to the appellant. The person shall certify to DOE that it has complied with the requirements of this paragraph. DOE may notify other persons participating in the proceeding of such comments and provide an

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opportunity for such persons to respond.

§ 303.106 Contents.

(a)(1) The appeal shall contain a concise statement of the grounds upon which it is brought and a description of the relief sought. It shall include a discussion of all relevant authorities, including, but not limited to, DOE rulings, regulations, interpretations and decisions on appeals and exceptions relief upon to support the appeal.

(2) An appeal of a prohibition order may not contain an assertion of significantly changed circumstances, as that term is defined in this subpart, and further defined in § 303.136(b)(2). An assertion of significantly changed circumstances relating to such orders should be made pursuant to Subpart J of this part.

(3) If the appeal (other than the appeal of a prohibition order) includes a request for relief based on significantly changed circumstances, there shall be a complete description of the events, acts, or transactions that comprise the significantly changed circumstances, and the appellant shall state why, if the significantly changed circumstances is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding. For purposes of this subpart, the term "significantly changed circumstances" shall mean—

(i) The discovery of material facts that were not known or could not have been known at the time of the prior proceeding;

(ii) The discovery of a law, regulation, interpretation, ruling, order or decision on an appeal or exception that was in effect at the time of the proceeding upon which the order is based and which, if such had been made known to DOE, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) A substantial change in the facts or circumstances upon which an outstanding and continuing order affecting the appellant was issued, which change has occurred during the interval between issuance of the order and the date of the appeal and was caused

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by forces or circumstances beyond the control of the appellant.

(b) A copy of the order that is the subject of the appeal shall be submitted with the appeal.

(c) The appellant shall state whether to the best of his knowledge the same or a related issue, act or transaction that is the subject of the appeal has been or presently is being considered or investigated by any DOE or EPA office, other Federal agency, department or instrumentality; or by a state or municipal agency or court; or by any law enforcement agency, including, but not limited to, a consideration or investigation in connection with a DOE proceeding described in this part, other than the proceeding from which the appeal is taken, or under Subpart A of 40 CFR Part 55. In addition, the appellant shall state whether contact has been made by the appellant or a person acting on his behalf with any person who is employed by DOE or EPA subsequent to service of the order that is being appealed with regard to the issue, act or transaction that is the subject of the appeal; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or dates of the contact. An appellant shall comply with this paragraph in lieu of § 303.9(e).

(d) The appellant shall state whether he requests or intends to request that there be a conference or hearing regarding the appeal. Any request not made at the time the appeal is filed shall be made as soon thereafter as possible, to insure that the conference or hearing is held when it will be most beneficial. The request and DOE's determination regarding it shall be made in accordance with Subpart N of this part, which determination is within DOE's discretion.

§ 303.107 DOE evaluation.

(a) *Processing.* (1) DOE may initiate an investigation of any statement in an appeal or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions from third persons

relevant to any appeal or other document provided that the appellant is afforded an opportunity to respond to all relevant third person submissions. In evaluating an appeal or other document, DOE may conduct its own investigation and consider any other source of information. DOE on its initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If DOE determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, DOE may dismiss the appeal with leave to amend within a specified time. If the failure to supply additional information is repeated or willful, DOE may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by § 303.105, DOE may dismiss the appeal without prejudice.

(3) Failure to satisfy requirements:

(i) If the appellant fails to satisfy the requirements of paragraph (b)(1) of this section, DOE may issue an order summarily denying the appeal. The order shall state the grounds for the denial and a copy of the order shall be served upon the appellant and any other person who participated in the appellate proceeding.

(ii) The order denying the appeal shall become a final order of DOE within 10 days of its service upon the appellant, unless within such 10-day period an amendment to the appeal that corrects the deficiencies identified in the order is filed with the Office of Hearings and Appeals.

(iii) Within 10 days of the filing of such amendment, as provided in paragraph (a)(3)(ii) of this section, DOE shall notify the appellant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies, that notice shall be an order dismissing the appeal as amended. Such order shall be a final order of DOE of which appellant may seek judicial review.

(b) *Criteria.* (1) An appeal may be summarily denied if—

(i) It is not filed in a timely manner, unless good cause is shown; or

(ii) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the DOE action was erroneous in fact or in law, or that it was arbitrary or capricious.

(2) DOE may deny any appeal if the appellant does not establish that—

(i) The appeal was filed by a person aggrieved by DOE action;

(ii) DOE's action was erroneous in fact or in law; or

(iii) DOE's action was arbitrary or capricious.

(3) The denial of an appeal shall be a final order of DOE of which the appellant may seek judicial review.

§ 303.108 Decision and order.

(a) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, DOE shall enter an appropriate order, which may include the modification of the order that is the subject of the appeal.

(b) The order shall include a written statement setting forth the pertinent facts and the legal basis of the order. The order shall state that it is a final order of DOE of which the appellant may seek judicial review.

(c) DOE shall serve a copy of the order upon the appellant, any other person who participated in the appellate proceeding and upon any other person reasonably identifiable by DOE as one who is aggrieved by such order.

(d) A copy of each order, with such modification as is necessary to insure the confidentiality of information protected from disclosure under 18 U.S.C. 1905 and 5 U.S.C. 552, will be filed in the Freedom of Information Reading Room described in § 303.13. If such copy contains information that has been claimed by an appellant or other person to be confidential, notice of DOE's intention to place a copy in the Freedom of Information Reading Room and an opportunity to respond shall be given to such person no less than five days prior to its placement in such room.

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§ 303.109 Appeal of a remedial order.

The appeal of a remedial order shall be in accordance with the procedures stated in this subpart, *except*:

(a) The appeal must be filed within 10 days of the service of the remedial order; and

(b) If the appeal is of a remedial order that was issued subsequent to a notice of probable violation that relates to an order or interpretation previously issued by DOE, with respect to which there was an exhaustion of administrative remedies, no issues will be considered on the current appeal that were raised in that prior proceeding.

(c) If an issue raised on an appeal of a remedial order is also being considered in connection with any other DOE proceeding, DOE may consolidate such issues and consider them in the appellate proceeding for the remedial order.

§ 303.110 Timeliness.

(a) When DOE has received all substantive information deemed necessary to process any appeal filed under this subpart, DOE shall serve notice of that fact upon the appellant and all other persons who receive notice of the proceeding pursuant to the provisions of § 303.105, except those persons who received notice by publication of the notice in the FEDERAL REGISTER, or participated in the appellate proceeding by the filing of comments; and if DOE fails to take action on the appeal within 90 days of serving such notice, the appellant may treat the appeal as having been denied in all respects and may seek judicial review thereof.

(b) Notwithstanding the provisions of paragraph (a) of this section, if DOE fails to take action on the appeal within 120 days of the filing of the appeal, the appellant may treat it as having been denied in all respects and may seek judicial review thereof.

(c) If a powerplant or major fuel burning installation, as appropriate, applies for a modification or rescission of a prohibition order or a construction order in accordance with Subpart J of this part, any appeal of the prohibition order that is the subject of such application shall be suspended until 30 days after an order has been issued in

accordance with Subpart J of this part or until 30 days from the date on which the powerplant or major fuel burning installation may treat that application for modification or rescission as being denied in all respects pursuant to Subpart J of this part. The 120-day period provided in paragraph (b) of this section shall be suspended during the period the appeal is stayed.

Subpart I—Stay

§ 303.120 Purpose and scope.

(a) This subpart establishes the procedures for the application for and granting of a stay by DOE.

(b) An application for a stay will only be considered:

(1) Incident to or pending an appeal from or order of DOE;

(2) Incident to an application for an exception from the application of any DOE regulations, rulings or generally applicable requirements when the stay sought is of the same regulation, ruling or generally applicable requirement from which the exception is sought;

(3) Incident to an application for modification or rescission of an issued and effective prohibition order or construction order;

(4) Incident to an application to quash or modify an administrative subpoena; or

(5) Pending judicial review.

(c) All DOE orders, regulations, rulings, and generally applicable requirements shall be complied with unless and until an application for a stay is granted.

§ 303.121 What to file.

(a) A person filing under this subpart shall file an "Application for Stay (ESECA)" which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any infor-

mation contained in the application or other documents submitted under this subpart, the procedures set out in § 303.9(f) shall apply.

§ 303.122 Where to file.

(a) An application for stay of a DOE order incident to an appeal from such order shall be filed with the Office of Hearings and Appeals at the address provided in § 303.12.

(b) An application for stay of the application of any or all DOE regulations, rulings, or generally applicable requirements incident to an application for an exception therefrom shall be filed with the Office of Hearings and Appeals at the address provided in § 303.12.

(c) An application for stay of an issued and effective prohibition order or a construction order incident to an application for modification or rescission of such order shall be filed with the DOE National Office at the address provided in § 303.12.

(d) An application for stay of a DOE order or of the application of any DOE regulations, rulings or generally applicable requirements pending judicial review shall be filed with the office that issued the order of which judicial review is sought.

(e) An application for stay of an administrative subpoena pending review by the Secretary of DOE or such other designated DOE official specified in § 303.8(h)(1) of an application to quash or modify the subpoena, shall be filed with such persons as appropriate, at the address provided in § 303.12.

§ 303.123 Notice.

(a) When administratively feasible, DOE shall notify each person reasonably identifiable by DOE as one who would be aggrieved by the DOE action sought that the applicant has filed for a stay and that DOE will accept written comment on the application.

(b) Any person submitting written comments to DOE with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 303.9(f), to the applicant. The person shall certify to DOE that it has

complied with the requirements of this paragraph. DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 303.124 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the application and to the DOE action sought. Such facts, shall include, but not be limited to, all information that related to the satisfaction of the criteria in § 303.125(b).

(b) The application shall include a description of the proceeding incident to which the stay is being sought. This description shall contain a discussion of all DOE and EPA actions relevant to the proceeding.

(c) The applicant shall state whether he requests or intends to request that there be a conference regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference is held when it will be most beneficial. The request and DOE's determination regarding it shall be made in accordance with Subpart N of this part, which determination is within DOE's discretion.

§ 303.125 DOE evaluation.

(a) *Processing.* (1) DOE may initiate an investigation of any statement in an application or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions from third persons relevant to any application or other document provided that the applicant is afforded an opportunity to respond to all relevant third person submissions. In evaluating an application or other documents, DOE may conduct its own investigation and consider any other source of information. DOE on its initiative may convene a conference, if, in its discretion, it considers that such conference will advance its evaluation of the application.

(2) If DOE determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted by the applicant, DOE may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, DOE may dismiss the application with prejudice.

(3) DOE shall process applications for stay as expeditiously as possible. When administratively feasible, DOE shall grant or deny the application for stay within 10 business days after receipt of the application.

(4) Notwithstanding the provision for notice to third persons in § 303.123(a), DOE may make a decision on an application for stay prior in the receipt of written comments.

(b) *Criteria.* The grounds for granting a stay are a showing that there is a likelihood of success on the merits and one or more of the following:

(1) A showing that irreparable injury will result in the event that the stay is denied;

(2) A showing that denial of the stay will result in a more immediate special hardship, inequity or unfair distribution of burdens to the applicant than to the other persons affected by the proceeding;

(3) A showing that it would be desirable for public policy or other reasons to preserve the *status quo ante* pending a decision on the merits of the appeal, exception, modification or rescission; or

(4) A showing that it is impossible for the applicant to fulfill the requirements of the original order.

§ 303.126 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, DOE shall issue an order granting or denying the application.

(b) The order shall include a written statement setting forth the relevant facts and the legal basis of the decision, and the terms and conditions of the stay.

(c) DOE shall serve a copy of the order upon the applicant, any other person who participated in the proceeding and upon any other person

reasonably identifiable by DOE as one who is aggrieved by such decision.

(d) The grant or denial of a stay is not an order of DOE subject to administrative review.

(e) In its discretion and upon a determination that such is in accordance with the objectives of the regulations and the FEAA, DEOA, or ESECA, DOE may order a stay on its own initiative.

Subpart J—Modification or Rescission of Prohibition Orders and Construction Orders

§ 303.130 Purpose and scope.

(a) This subpart establishes the procedures for the filing by a powerplant or major fuel burning installation of an application for modification or rescission of a prohibition order or a construction order.

(b) A proceeding for modification or rescission of a prohibition order or a construction order may be commenced by DOE in response to an application or upon its initiative. A proceeding initiated by DOE may be commenced at any time after DOE has issued a prohibition order or construction order. Sections 303.134, 303.136, 303.137, and 303.139 shall be applicable to the proceeding regardless of the manner in which the proceeding was initiated. Other sections of this subpart apply only to a proceeding commenced in response to an application.

§ 303.131 What to file.

(a) A powerplant or major fuel burning installation filing under this subpart shall file an "Application for Modification (or Rescission) of Prohibition Order (or Construction Order)" which should be clearly labeled as such, using the applicable terms, both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any infor-

mation contained in the application or other documents submitted under this subpart, the procedures stated in § 303.9(f) shall apply.

§ 303.132 Where to file.

An application for modification or rescission shall be filed with the DOE National Office at the address provided in § 303.12.

§ 303.133 When to file.

(a) An application for modification or rescission of a prohibition order or a construction order based on significantly changed circumstances, which circumstances occurred during the interval between issuance of such orders and service of an NOE, shall be filed within 30 days of service of such notice.

(b) An application for modification or rescission of a prohibition order or construction order based on significantly changed circumstances other than those stated in paragraph (a) of this section may be filed at any time after the NOE is served.

§ 303.134 Notice.

(a) Prior to issuance of an order modifying or rescinding a prohibition order or a construction order, either in response to an application or on its initiative, DOE may publish notice of the intention to take such action in the FEDERAL REGISTER and shall serve a copy of any such notice on the powerplant or major fuel burning installation that would be affected by the proposed order. Any such notice shall describe the proposed action and provide a period of no less than 10 days from the date of publication in which interested persons may file written data, views or arguments.

(b) If DOE on its initiative commences a proceeding for the modification or rescission of a prohibition order or construction order and does not publish in the FEDERAL REGISTER a notice of its intention to take such action, it shall give notice, either by service of a written notice or by verbal communication, which communication shall be promptly confirmed in writing, to each person who was served the order that DOE proposes to modify or rescind. A reasonable period of time

shall be given for each person notified to file a written response or give a verbal communication, which communication shall be promptly confirmed in writing.

§ 303.135 Contents.

(a)(1) An application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, acts or transactions that are the subject of the application and to the DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a description of the acts or transactions that would be affected by the requested action; and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted to DOE upon its request. A copy of the prohibition order or construction order of which modification or rescission is sought shall be included with the application.

(2) The application referred to in paragraph (a)(1) of this section shall fully describe the events, acts, or transactions that comprise the significantly changed circumstances as defined in § 303.136(b), upon which the application for modification or rescission of a prohibition order or construction order is based. The application shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding.

(b) The applicant shall state whether he requests or intends to request that there be a conference regarding an application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference is held when it will be most beneficial. The request and DOE's determination regarding it shall be made in accordance with Subpart N of this part, which determination is in DOE's discretion.

(c) The application shall include a discussion of all relevant authorities,

including but not limited to, DOE or EPA rulings, regulations, interpretations, and decisions on appeals and exceptions relied upon to support the action sought therein.

§ 303.136 DOE evaluation.

(a) *Processing.* (1) DOE may initiate an investigation of any statement in an application or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions from third persons relevant to any application for modification or rescission or other document: *Provided*, That the applicant is afforded an opportunity to respond to all relevant third person submissions, except that the affected powerplant or major fuel burning installation's opportunity to respond to written comments or oral presentations in response to a notice of intention to issue a modification or rescission of an order shall be in accordance with such notice. In evaluating an application for modification or rescission or other document, DOE may conduct its own investigation and consider any other source of information. DOE may on its initiative convene a conference, if, in its discretion, it considers that such will advance its evaluation of the application.

(2) If DOE determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, DOE may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, DOE may dismiss the application with prejudice.

(b) *Criteria.* DOE's decision with respect to modification or rescission of a prohibition order or a construction order, except as provided in paragraph

(c) of this section, shall be based on a determination that there are significantly changed circumstances. For purposes of this paragraph, the term "significantly changed circumstances" shall mean:

(1) The discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based—in particular, (1)

those that would substantially affect the findings made by DOE in the order and (ii) those developed in connection with DOE's environmental impact analyses;

(2) The discovery of a law, regulation, interpretation, ruling, order or decision on appeal or exception that was in effect at the time of the proceeding upon which the application or order is based and which, if such had been made known to DOE, would have been relevant to the proceeding and would have substantially altered the outcome; or

(3) There has been a substantial change in the facts or circumstances upon which an order is based, which change occurred during the interval between issuance of the orders and service of an NOE, or occurred during the interval after service of an NOE and prior to the application for modification or rescission of a prohibition order or construction order, and was caused by forces or circumstances beyond the control of the applicant.

(c) DOE's decision with respect to the modification or rescission of a prohibition order or a construction order in a proceeding commenced at DOE's initiative may be based on grounds other than a determination that there are "significantly changed circumstances."

§ 303.137 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, DOE shall issue an appropriate order.

(b) *Prohibition orders.* The order shall either modify or rescind the prohibition order or deny the application for modification or rescission and shall include a written statement setting forth the pertinent facts and legal basis of the order. The order shall provide that any person aggrieved thereby may file an appeal with the DOE Office of Hearings and Appeals in accordance with Subpart H of this part. If appropriate, it shall state that a modified prohibition order will not be effective for any period certified by the Administrator of EPA pursuant to

section 113(b) of the Clean Air Act (42 U.S.C. 7413(b)).

(c) **Construction orders.** The order shall either modify or rescind the construction order or deny the application for modification or rescission and shall include a written statement setting forth the pertinent facts and legal basis of the order. The order shall provide that any person aggrieved thereby may file an appeal with the DOE Office of Hearings and Appeals in accordance with Subpart H of this part.

(d) DOE shall serve a copy of the order upon the applicant or, if the action was initiated by DOE, upon the affected powerplant or major fuel burning installation, and any other person who participated in the proceeding by filing written comments or making oral presentation. Notice of issuance of an order substantially modifying or rescinding a prohibition order or a construction order shall be published in the FEDERAL REGISTER.

§ 303.138 Timeliness.

(a) If DOE fails to take action on an application for modification or rescission of a prohibition order or a construction order within 90 days of filing, the applicant may treat the application as having been denied in all respects, and may appeal therefrom as provided in this subpart.

(b) Notwithstanding the provisions of paragraph (a) of this section, the applicant may treat the application as having been denied in all respects and may seek appeal therefrom as provided in this subpart if DOE fails to issue an order granting or denying the application within 150 days of the filing of such application.

(c) For purposes of this section, the term "action" includes service of a "Notice of Intention to Modify (or Rescind) Prohibition Order (or Construction Order)" on the applicant.

§ 303.139 Appeal.

(a) Any person aggrieved by an order issued by DOE under this subpart may file an appeal with the DOE Office of Hearings and Appeals in accordance with Subpart H of this part, except as provided in paragraph (c) of this section.

(b)(1) The appeal of an order issued pursuant to this subpart shall be filed within 30 days of service of the order or within 30 days of the date on which the applicant can treat the application as being denied in all respects, except as provided in paragraph (c) of this section.

(c) When an order modifying a prohibition order or construction order is the result of a proceeding initiated by DOE prior to issuance of an NOE, there shall be no appeal of such order until service of an NOE; such appeal shall be filed within 30 days after issuance of an NOE. If an order rescinding a prohibition order is the result of a proceeding initiated by DOE prior to issuance of an NOE any appeal of such rescission order shall be filed within 30 days of service of the rescission order.

(d) There has not been an exhaustion of administrative remedies until an appeal has been filed pursuant to Subpart H of this part and the appellate proceeding is completed by the issuance of an order granting or denying the appeal.

Subpart K—Modification or Rescission of Orders Other Than Prohibition Orders or Construction Orders

§ 303.140 Purpose and scope.

(a) This subpart establishes the procedures for the filing of an application for modification or rescission of a DOE order other than a prohibition order or construction order. Modification or rescission is a summary proceeding that will be initiated only if the criteria described in § 303.145(b) are satisfied, unless the proceeding is commenced at DOE's initiative as provided in § 303.145(c).

(b) A proceeding for modification or rescission of an order other than a prohibition order or construction order may be commenced by DOE in response to an application or on its initiative. Sections 303.143(b), 303.145(a), 303.146 (b) and (c), and 303.148 shall be applicable to the proceeding regardless of the manner in which the proceeding is initiated. Other sections of this subpart apply only to a proceeding commenced in response to an application.

§ 303.141

§ 303.141 What to file.

(a) A person filing under this subpart shall file an "Application for Modification (or Rescission) (ESECA)" which should be clearly labeled, using the applicable term, as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing and signed by the person filing the application. The applicant shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart.

(b) If the applicant wishes to claim confidential treatment for any information contained in the application or other documents submitted under this subpart, the procedures set out in § 303.9(f) shall apply.

§ 303.142 Where to file.

All applications for modification or rescission filed under this subpart shall be filed with the Office of Hearings and Appeals at the address provided in § 303.12.

§ 303.143 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, from which confidential information has been deleted in accordance with § 303.9(f), to each person who is reasonably ascertainable by the applicant as a person who will be aggrieved by the DOE action sought, including persons who participated in the prior proceeding. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the DOE office with which the application was filed within 10 days. The application filed with DOE shall include certification that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

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(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the application a description of the persons or class or classes or persons to whom notice was not sent.

DOE may require the applicant to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the **FEDERAL REGISTER**.

(c)(1) The DOE shall serve notice on any other person readily identifiable by the DOE as one who will be aggrieved by the DOE action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of that notice.

(2) If DOE on its initiative commences a proceeding for the modification or rescission of an order other than a prohibition order or construction order, it shall give notice, either by service of a written notice or by verbal communication, which communication shall be promptly confirmed in writing, to each person who was served the order or interpretation that DOE proposes to modify or rescind. A reasonable period of time shall be given for each person notified to file a written response or give a verbal communication, if promptly confirmed in writing.

(d) Any person submitting written comments to DOE with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 303.9(f), to the applicant. The person shall certify to DOE that it has complied with the requirements of this paragraph. DOE may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 303.144 Contents.

(a) The application shall contain a full and complete statement of all rel-

evant facts pertaining to the circumstances, acts or transactions that are the subject of the application and to the DOE action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested action; and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted to DOE upon its request. A copy of the order of which modification or rescission is sought shall be included with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible, to insure that the conference is held when it will be most beneficial. The request and DOE's determination regarding it shall be made in accordance with Subpart N of this part which determination is in DOE's discretion.

(c) The applicant shall fully describe the events, acts, or transactions that comprise the significantly changed circumstances, as defined in § 303.145(b)(2), upon which the application is based. The applicant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the prior proceeding.

(d) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE or EPA rulings, regulations, interpretations and decisions on appeal and exception relied upon to support the action sought therein.

§ 303.145 DOE evaluation.

(a) *Processing.* (1) DOE may initiate an investigation of any statement in an application or any other document submitted to it and may utilize in its evaluation any relevant facts obtained

by such investigation. DOE may solicit or accept submissions from third persons relevant to the application for modification or rescission or other document provided that the applicant is afforded an opportunity to respond to all relevant third person submissions. In evaluating an application for modification or rescission or other document, DOE may conduct its own investigation and consider any other source of information. DOE on its initiative may convene a conference if, in its discretion, it considers that such conference will advance its evaluation of the application.

(2) If DOE determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, DOE may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, DOE may dismiss the application with prejudice. If the applicant fails to provide the notice required by § 303.143, DOE may dismiss the application without prejudice.

(3) *Failure to satisfy requirements.*

(i) If the applicant fails to satisfy the requirements of paragraph (b)(1) of this section, DOE shall issue an order denying the application. The order shall state the grounds for the denial.

(ii) The order denying the application shall become final within 10 days of its service upon the applicant, unless within such 10-day period an amendment to correct the deficiencies identified in the order is filed with the Office of Hearings and Appeals.

(iii) Within 10 days of the filing of such amendment, DOE shall notify the applicant whether the amendment corrects the specified deficiencies. If the amendment does not correct the deficiencies, the notice shall be an order dismissing the application as amended. Such order shall be a final order of DOE of which the applicant may seek judicial review.

(b) *Criteria.* (1) An application for modification or rescission of an order (other than a prohibition order or construction order) shall be processed only if—

§ 303.146

(i) The application demonstrates that it is based on significantly changed circumstances; and

(ii) The 30-day period within which a person may file an appeal has lapsed or, if an appeal has been filed, a final order has been issued.

(2) For purposes of this subpart, the term "significantly changed circumstances" shall mean—

(i) The discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) The discovery of a law, regulation, interpretation, ruling, order or decision on appeal or exception that was in effect at the time of the proceeding upon which the application is based and which, if such had been made known to DOE, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of DOE affecting the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

(c) DOE's decision with respect to the initiation of a proceeding to modify or rescind an order (other than a prohibition order or a construction order) commenced on DOE's initiative shall be in its discretion, and DOE's decision in such proceeding with respect to the modification or rescission of such order may be based on grounds other than a determination that there are "significantly changed circumstances."

§ 303.146 Decision and order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, DOE shall issue an order granting or denying the application.

(b) The order shall include a written statement setting forth the pertinent facts and the legal basis of the order. The order shall state that this is a

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final order of which the applicant may seek judicial review.

(c) DOE shall serve a copy of the order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by DOE as one who is aggrieved by such order.

§ 303.147 Timeliness.

If DOE fails to take action on any application filed under this subpart within 90 days of filing, the applicant may treat the application as having been denied in all respects and may appeal therefrom as provided in this subpart.

§ 303.148 Appeal.

The denial of an application for modification or rescission filed under this subpart shall be a final order of DOE of which the applicant may seek judicial review.

Subpart L—Rulings

§ 303.150 Purpose and scope.

This subpart establishes the criteria for the issuance of interpretative rulings by the General Counsel. All rulings shall be published in the *FEDERAL REGISTER*. Any person is entitled to rely upon such ruling to the extent provided in this subpart.

§ 303.151 Criteria for issuance.

(a) A ruling may be issued, in the discretion of the General Counsel, whenever there have been a substantial number of inquiries with regard to similar factual situations or a particular section of the regulations.

(b) The General Counsel may issue a ruling whenever it is determined that it will be of assistance to the public in applying the regulations to a specific situation.

§ 303.152 Modification or rescission.

(a) A ruling may be modified or rescinded by:

(1) Publication of the modification or rescission in the *FEDERAL REGISTER*; or

(2) A rulemaking proceeding in accordance with Subpart M of this part.

(b) Unless and until a ruling is modified or rescinded as provided in paragraph (a) of this section, no person shall be subject to the sanctions or penalties stated in Subpart Q of this part for actions taken in reliance upon the ruling, notwithstanding that the ruling shall thereafter be declared by judicial or other competent authority to be invalid. Upon such declaration, no person shall be entitled to rely upon the ruling.

§ 303.153 Comments.

A written comment on or objection to a published ruling may be filed at any time with the General Counsel at the address provided in § 303.12.

§ 303.154 Appeal.

There is no administrative appeal of a ruling.

Subpart M—Rulemaking

§ 303.160 Purpose and scope.

(a) This subpart establishes the procedures that govern a rulemaking proceeding. The initiation of a rulemaking proceeding is within the sole discretion of DOE.

(b) Rulemaking by DOE shall be in accordance with the Administrative Procedure Act (5 U.S.C. 551, et seq. (1970)) and the FEAA.

§ 303.161 What to file.

(a) *Comments in connection with a rulemaking.* Any comments filed in connection with a rulemaking shall be filed in accordance with the instructions in the notice of proposed rulemaking published in the **FEDERAL REGISTER**. Such comments shall be in writing and signed by the person filing them.

(b) *Petition for rulemaking.* (1) Any person may at any time file a petition regarding any DOE regulation or amendment thereto or, by letter, request that a rulemaking proceeding be instituted. Such petition or request shall be signed by the person filing it.

(2) Upon due consideration of a petition for rulemaking, expressly designated as such, DOE shall either: (i) institute a rulemaking as proposed or as modified in its discretion; (ii) notify

the petitioner in writing that it does not intend to institute a rulemaking as proposed or as modified and stating the reasons therefore; or (iii) notify the petitioner in writing that the matter is under continuing consideration and that no decision can be made at that time because of the inadequacy of available information, changing circumstances or other reasons as set forth in such notice.

§ 303.162 Where to file.

All comments filed in connection with a rulemaking shall be submitted in accordance with the instructions in the notice of proposed rulemaking. Any other petition or request shall be filed with the General Counsel at the address provided in § 303.12.

Subpart N—Conferences, Hearings, and Public Hearings

§ 303.170 Purpose and scope.

This subpart establishes the procedures for requesting and conducting a DOE conference, hearing, or public hearing. Such proceedings shall be convened in the discretion of DOE, consistent with the requirements of FEAA, DEOA, and ESECA.

§ 303.171 Conferences.

(a) DOE in its discretion may direct that a conference be convened, on its initiative or upon request by a person, when it appears that such conference will materially advance the proceeding. The determination as to who may attend a conference convened under this subpart shall be in the discretion of DOE, but a conference will usually not be open to the public.

(b) A conference may be requested in connection with any proceeding of DOE by any person who might be aggrieved by that proceeding. The request may be made in writing or verbally, but must include a specific showing as to why such conference will materially advance the proceeding. The request shall be addressed to the DOE office that is conducting the proceeding.

(c) A conference may only be convened after actual notice of the time, place, and nature of the conference is

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provided to the person who requested the conference.

(d) When a conference is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the conference, but will be treated as if submitted in the regular course of the proceedings. A transcript of the conference will not usually be prepared. However, DOE in its discretion may have a verbatim transcript prepared.

(e) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless DOE in its discretion determines that such would be advisable.

§ 303.172 Hearings.

(a) DOE in its discretion may direct that a hearing be convened, on its initiative or upon request by a person, when it appears that such hearing will materially advance the proceeding. The determination as to who may attend a hearing convened under this subpart shall be in the discretion of DOE, but a hearing will usually not be open to the public.

(b) A hearing may only be requested in connection with an application for an exception or an appeal. Such request may be by the applicant, appellant, or any other person who might be aggrieved by the DOE action sought. The request shall be in writing and shall include a specific showing as to why such hearing will materially advance the proceeding. The request shall be addressed to the Office of Hearings and Appeals as provided in § 303.12.

(c) DOE will designate an agency official to conduct the hearing, and will specify the time and place for the hearing.

(d) A hearing may only be convened after actual notice of the time, place, and nature of the hearing is provided both to the applicant or appellant and to any other person reasonably identifiable by DOE as one who will be aggrieved by the DOE action involved. The notice shall include, as appropriate:

(1) A statement that such person may participate in the hearing; or

(2) A statement that such person may request a separate conference or hearing regarding the application or appeal.

(e) When a hearing is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the hearing, but will be treated as if submitted in the regular course of the proceedings. A transcript of the hearing will not usually be prepared. However, DOE in its discretion may have a verbatim transcript prepared.

(f) The official conducting the hearing may administer oaths and affirmations, rule on the presentation of information, receive relevant information, dispose of procedural requests, determine the format of the hearing, and otherwise regulate the course of the hearing.

(g) Because a hearing is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless DOE in its discretion determines that such would be advisable.

§ 303.173 Public hearings.

(a) A public hearing shall be convened incident to a rulemaking:

(1) When the proposed rule or regulation is likely to have a substantial impact on the Nation's economy or large numbers of individuals or businesses; or

(2) When DOE determines that a public hearing would materially advance the consideration of the issue. A public hearing may be requested by any interested person in connection with a rulemaking proceeding, but shall only be convened on the initiative of DOE unless otherwise required by statute.

(b) A public hearing may be convened incident to any other proceeding, including the environmental analysis, if such analysis results in preparation of an environmental impact statement covering significant site-specific impacts that are likely to result from a specific prohibition or construction order, or group of such orders, when DOE in its discretion determines that such public hearing

would materially advance the consideration of the issue.

(c) A public hearing may only be convened after publication of a notice in the **FEDERAL REGISTER**, which shall state the time, place, and nature of the public hearing.

(d) Interested persons may file a request to participate in the public hearing in accordance with the instructions in the notice published in the **FEDERAL REGISTER**. The request shall be in writing and signed by the person making the request. It shall include a description of the person's interest in the issue or issues involved and of the anticipated content of the presentation. It shall also contain a statement explaining why the person would be an appropriate spokesperson for the particular view expressed.

(e) DOE shall appoint a presiding officer to conduct the public hearing. An agenda shall be prepared that shall provide to the extent practicable, for the presentation of all relevant views by competent spokespersons.

A verbatim transcript shall be made of the hearing. The transcript, together with any written comments submitted in the course of the proceeding, shall be made available for public inspection and copying in the Hearings and Appeals Docket Room or Freedom of Information Reading Room, as appropriate, described in § 303.13.

The information presented at the public hearing, together with the written comments submitted and other relevant information developed during the course of a proceeding, shall provide the basis for the DOE decision.

Subpart C—Complaints

§ 303.180 Purpose and scope.

This subpart establishes the procedures for the filing and consideration of complaints relating to alleged violations of the ESECA coal conversion regulations.

§ 303.181 What to file.

A person filing under this subpart shall file a "Complaint (ESECA)" which should be clearly labeled as such both on the complaint and on the outside of the envelope in which the complaint is transmitted, and shall

be in writing and signed by the person filing the complaint. The complainant shall comply with the general filing requirements stated in § 303.9 in addition to the requirements stated in this subpart. Verbal complaints that otherwise satisfy the requirements of this subpart will be accepted, but written verification may be requested by the DOE.

§ 303.182 Where to file.

A complaint shall be filed with the DOE National Office at the address provided in § 303.12.

§ 303.183 Contents.

The complaint shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the complaint and to the DOE action sought. Such facts shall include the names and addresses of all persons involved (if reasonably ascertainable) and a description of the events that led to the complaint. It shall include a statement describing the regulation, ruling, order or interpretation that allegedly has been violated.

§ 303.184 DOE evaluation.

(a) *Processing.* DOE may initiate an investigation of any statement in a complaint or any other document submitted to it and may utilize in its evaluation any relevant facts obtained by such investigation. DOE may solicit or accept submissions relevant to a complaint or other document from third persons to the proceeding. In evaluating a complaint, DOE may consider any other source of information. DOE on its initiative may order a conference if, in its discretion, it considers such conference will advance its evaluation of the complaint.

(b) *Confidentiality of information.* Information received in the investigation of a complaint, including the identity of the complainant and any other person who provides information during the proceeding, shall remain confidential to the extent it is covered by the investigatory file exception to public disclosure contained in 5 U.S.C. 552 unless, upon proper notice to the complainant and an op-

portunity to respond, DOE determines that disclosure would be in the public interest.

§ 303.185 Decision.

After consideration of a written complaint, unless written verification of a verbal complaint was not requested, and of other relevant information received or obtained during the proceeding, DOE may:

(a) Issue a notice of probable violation or remedial order for immediate compliance in accordance with the provisions of Subpart P of this part;

(b) Determine that no violation has occurred or that a notice of probable violation or a remedial order for immediate compliance would not be appropriate; or

(c) Take such other action as it deems appropriate.

Subpart P—Notice of Probable Violation and Remedial Order

§ 303.190 Purpose and scope.

(a) This subpart establishes the procedures for determining the nature and extent of violations of the ESECA coal conversion regulations and the procedures for issuance of a notice of probable violation, a remedial order, or a remedial order for immediate compliance.

(b) When any report required by DOE or any audit or investigation discloses, or DOE otherwise discovers, that there is reason to believe a violation of any provision of the ESECA coal conversion regulations, or any order issued thereunder, has occurred, is continuing or is about to occur, DOE may conduct proceedings to determine the nature and extent of the violation and may issue a remedial order thereafter. DOE may commence such proceeding by serving a notice of probable violation or by issuing a remedial order for immediate compliance.

§ 303.191 Notice of probable violation.

(a) DOE may begin a proceeding under this subpart by issuing a notice of probable violation if DOE has reason to believe that a violation has occurred, is continuing, or is about to occur.

(b) Within 10 days of the service of a notice of probable violation, the person upon whom the notice is served may file a reply with the DOE office that issued the notice of probable violation at the address provided in § 303.12. DOE may extend the 10-day period for good cause shown.

(c) The reply shall be in writing and signed by the person filing it. The reply shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the notice of probable violation. Such facts shall include a complete statement of the business or other reasons that justify the act or transaction, if appropriate; a detailed description of the act or transaction; and a full discussion of the pertinent provisions and relevant facts reflected in any documents submitted with the reply. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the reply. When the notice of probable violation pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information regarding the entire transaction shall be submitted.

(d) The reply shall include a discussion of all relevant authorities, including, but not limited to DOE and EPA rulings, regulations, interpretations, and decisions on appeals and applications for exception relied upon to support the particular position taken.

(e) The reply should indicate whether the person requests or intends to request a conference regarding the notice. Any request not made at the time of the reply shall be made as soon thereafter as possible to insure that the conference is held when it will be most beneficial. A request for a conference must conform to the requirement of Subpart N of this part, which determination is within DOE's discretion.

(f) If a person has not filed a reply with DOE within the 10-day period provided, and DOE has not extended the 10-day period, the person shall be deemed to have conceded the accuracy of the factual allegations and legal conclusions stated in the notice of probable violation.

(g) If DOE finds, after the 10-day period provided in § 303.191(b), that no violation has occurred, is continuing, or is about to occur, or that for any reason the issuance of a remedial order would not be appropriate, it shall notify, in writing, the person to whom a notice of probable violation has been issued that the notice is rescinded.

§ 303.192 Remedial order.

(a) If DOE finds, after the 10-day period provided in § 303.191(b), that a violation has occurred, is continuing, or is about to occur, DOE may issue a remedial order. The order shall include a written statement setting forth the relevant facts and the legal basis of the remedial order.

(b) A remedial order issued under this section shall be effective upon issuance, in accordance with its terms, until stayed, suspended, modified, or rescinded. A remedial order shall remain in effect notwithstanding the filing of an application to modify or rescind it under Subpart K of this part.

(c) A remedial order may be referred at any time to the Department of Justice for appropriate action in accordance with Subpart Q of this part.

§ 303.193 Remedial order for immediate compliance.

(a) Notwithstanding the provisions of §§ 303.191 and 303.192, DOE may issue a remedial order for immediate compliance, which shall be effective upon issuance and until rescinded or suspended, if it finds that:

(1) There is a strong probability that a violation has occurred, is continuing or is about to occur;

(2) Irreparable harm will occur unless the violation is remedied immediately; and

(3) The public interest requires the avoidance of such irreparable harm through immediate compliance and waiver of the procedures afforded under §§ 303.191 and 303.192.

(b) A remedial order for immediate compliance shall be served promptly by telex or telegram upon the person against whom such order is issued, with a copy of the remedial order for immediate compliance served by regis-

tered or certified mail. The order shall contain a written statement of the relevant facts and the legal basis for the remedial order for immediate compliance, including the findings required by paragraph (a) of this section.

(c) DOE may rescind or suspend a remedial order for immediate compliance if it appears that the criteria set forth in paragraph (a) of this section are no longer satisfied. When appropriate, however, such a suspension or rescission may be accompanied by a notice of probable violation issued under § 303.191.

(d) If at any time in the course of a proceeding commenced by a notice of probable violation the criteria set forth in paragraph (a) of this section are satisfied, DOE may issue a remedial order for immediate compliance, even if the 10-day period for reply specified in § 303.191(b) has not expired.

(e) At any time after a remedial order for immediate compliance has become effective, DOE may refer such order to the Department of Justice for appropriate action in accordance with Subpart Q of this part.

§ 303.194 Remedies.

A remedial order or a remedial order for immediate compliance may require the person to whom it is directed to take such action as DOE determines is necessary to eliminate or to compensate for the effects of a violation.

§ 303.195 Appeal.

(a) No notice of probable violation issued pursuant to this subpart shall be deemed to be an action of which there may be an administrative appeal pursuant to Subpart H of this part.

(b) Any person to whom a remedial order or a remedial order for immediate compliance is issued under this subpart may file an appeal with the DOE Office of Hearings and Appeals in accordance with Subpart H of this part. The appeal must be filed within 10 days of service of the order from which the appeal is taken.

Subpart Q—Investigations, Violations, Sanctions, and Judicial Actions

§ 303.200 Investigations.

(a) *General.* DOE may, in its discretion, initiate investigations relating to compliance by any person with any rule, regulation, or order promulgated by DOE under the authority of sections 2 and 12 of ESECA (15 U.S.C. 792 and 797, respectively), any decree of court relating thereto, or any other agency action. DOE encourages voluntary cooperation with its investigations. When the circumstances warrant, however, DOE may issue subpoenas in accordance with and subject to § 303.8. DOE may conduct investigative conferences and hearings in the course of any investigation in accordance with Subpart N of this part, which determination is within DOE's discretion.

(b) *Investigators.* Investigations will be conducted by representatives of DOE who are duly designated and authorized for such purposes. Such representatives have the authority to administer oaths and receive affirmations in any matter under investigation by DOE.

(c) *Notification.* Any person who is under investigation by DOE in accordance with this section and who is requested to furnish information or documentary evidence shall be notified as to the general purpose for which such information or evidence is sought.

(d) *Termination.* When the facts disclosed by an investigation indicate that further action is unnecessary or unwarranted at that time, the investigative file will be closed without prejudice to further investigation by DOE at any time that circumstances so warrant.

(e) *Confidentiality.* Information received in an investigation under this section, including the identity of the person investigated and any other person who provides information during the investigation, shall, unless otherwise determined by DOE, remain confidential to the extent it is covered under the investigatory file exception to public disclosure contained in 5 U.S.C. 552.

§ 303.201 Violations.

Any practice that circumvents or contravenes or results in a circumvention or contravention of the requirements of any provision of the ESECA coal conversion regulations or any order issued pursuant thereto is a violation of the DOE regulations stated in such parts and is unlawful.

§ 303.202 Sanctions.

(a) *General.* Any person who violates any provision of the ESECA coal conversion regulations or any order issued pursuant thereto shall be subject to penalties and sanctions as provided herein.

(1) The provisions herein for penalties and sanctions shall be deemed cumulative and not mutually exclusive.

(2) Each day that a violation of the provisions of the ESECA coal conversion regulations or any order issued pursuant thereto continues shall be deemed to constitute a separate violation within the meaning of the provisions of this part relating to criminal fines and civil penalties.

(b) *Criminal fines.* (1) Any person who willfully violates any provision of the ESECA coal conversion regulations or any order issued pursuant thereto shall be subject to a fine of not more than \$5,000 for each violation.

(2) Criminal violations are prosecuted by the Department of Justice upon referral by DOE.

(c) *Civil penalties.* (1) Any person who violates any provision of the ESECA coal conversion regulations, or any order issued pursuant thereto shall be subject to a civil penalty of not more than \$2,500 for each violation. Actions for civil penalties are prosecuted by the Department of Justice upon referral by DOE.

(2) When DOE considers it to be appropriate or advisable, DOE may compromise and settle, and collect civil penalties.

(d) *Other Penalties.* Willful concealment of material facts, or false or fictitious or fraudulent statements or representations, or willful use of any false writing or document containing false, fictitious or fraudulent statements pertaining to matters within the scope

of ESECA, DEOA, or FEAA by any person shall subject such person to the criminal penalties provided in 18 U.S.C. 1001 (1970).

§ 305.203 Injunctions.

Whenever it appears to DOE that any person has engaged, is engaged, or is about to engage in any act or practice constituting a violation of any regulation or order issued under the ESECA coal conversion regulations DOE may request the Attorney General to bring a civil action in the appropriate district court of the United States to enjoin such acts or practices and, upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. The relief sought may include a mandatory injunction commanding any person to comply with any provision of such order or regulation, the violation of which is prohibited by section 12(a) of ESECA (15 U.S.C. 797).

PART 305—COAL UTILIZATION

Sec.

305.1 Scope.

305.2 Definitions.

305.7 Effective date of prohibition orders.

305.8 Modification and rescission of prohibition orders.

305.9 Consideration of environmental impact.

305.10 Procedures.

AUTHORITY: Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319); (15 U.S.C. 791 et seq.), as amended by Pub. L. 94-163; Pub. L. 95-70; Pub. L. 95-91; and Pub. L. 95-626; Federal Energy Administration Act of 1974 (Pub. L. 93-275) (15 U.S.C. 761 et seq.), as amended by Pub. L. 94-385; and Pub. L. 95-91; Powerplant and Industrial Fuel Use Act of 1978 (Pub. L. 95-620) (42 U.S.C.A. 8301 et seq.) E.O. 11790 (39 FR 23185; E.O. 12009, 42 FR 46267).

SOURCE: 45 FR 67604, Oct. 10, 1980, unless otherwise noted.

§ 305.1 Scope.

(a) **Applicability.** This part applies to certain powerplants and major fuel burning installations that DOE is authorized to prohibit from burning natural gas or petroleum products as their primary energy source.

(b) **Purpose.** This part, together with Part 303 of this chapter, establishes the methods and procedures by which DOE will exercise its powers under section 2 of ESECA (15 U.S.C. 792) to prohibit a powerplant or major fuel burning installation from burning natural gas or petroleum products as its primary energy source.

§ 305.2 Definitions.

For purposes of this part—

“Action” means a prohibition order, or modification or rescission of such order, issued by DOE pursuant to sections 2 (a) and (b) of ESECA (15 U.S.C. 792).

“Air pollution requirement” means any emission limitation, schedule or timetable for compliance, or other requirement, which is prescribed under any Federal, State, or local law or regulation, including the Clean Air Act (except for any requirement prescribed under section 113(d), section 110(a)(2)(F)(v), or section 303 of such Act (42 U.S.C. 7413, 7410(a)(2)(F)(v) and 7603, respectively), and which limits stationary source emissions resulting from combustion of fuels (including a prohibition on, or specification of, the use of any fuel of any type, grade, or pollution characteristic).

“Clean Air Act” means the Clean Air Act, as amended, 42 U.S.C. 7401, et seq. (1970).

“Coal” includes coal derivatives.

“Delayed compliance order” means an extension issued by the Administrator of EPA in accordance with section 113(d) of the Clean Air Act (42 U.S.C. 7413(d)) as a result of which a powerplant or major fuel burning installation shall not, until January 1, 1986, be prohibited, by reason of the application of any air pollution requirement, from burning coal which is available to that source, except as otherwise provided in section 113(d) of that Act (42 U.S.C. 7413(d)).

“DEOA” means the Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101 et seq. (1977).

“Dispatching system” means (1) an integral group of powerplants within a geographical power pool for which there is centralized control of power

generation, scheduling, and transmission; or (2) where there is no such integral power system, that powerplant or groups of powerplants determined by DOE, in consultation with the Federal Energy Regulatory Commission, to constitute a power generation system sufficient in scope that DOE may make a reliability finding within the meaning of ESECA.

"DOE" means the Department of Energy, including the Secretary of Energy or his designee.

"EPA" means the Environmental Protection Agency.

"ERA" means the Economic Regulatory Administration of the Department of Energy.

"ESECA" means the Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319) (15 U.S.C. 791, et seq.), as amended by Pub. L. 94-163; Pub. L. 95-70; Pub. L. 95-91; and Pub. L. 95-620.

"Interested person" includes members of the public, as well as any person with an interest sought to be protected under ESECA.

"Major fuel burning installation" means an installation or unit other than a powerplant that has or is a fossil-fuel fired boiler, burner, or other combustor of fuel or any combination thereof at a single site, and includes any person who owns, leases, operates or controls any such installation or unit.

"Natural gas" includes dry gas and casinghead gas.

"Notice of effectiveness" or "NOE" means either a written statement issued by DOE to an existing powerplant or major fuel burning installation, subsequent to a certification by EPA pursuant to section 112(b) of the Clean Air Act Amendments of 1977 (Pub. L. 95-95), advising such powerplant or installation of the date that a prohibition order applicable to it and the prohibitions contained therein become effective; or a written statement issued by DOE to a new powerplant or major fuel burning installation advising such powerplant or installation of the date that a construction order applicable to it became effective.

"Person" means any association, firm, company, corporation, estate, in-

dividual, joint-venture, partnership, or sole proprietorship or any other entity however organized including charitable, educational, or other eleemosynary institutions, and the Federal Government, including corporations, departments, Federal agencies, and other instrumentalities, and State and local governments, and includes any officer, director, owner or duly authorized representative thereof. DOE may, in regulations and in any forms issued in this part, treat as a person:

(a) A parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls,

(b) A parent and its consolidated entities,

(c) An unconsolidated entity, or

(d) Any part of a person.

"Petroleum product" means crude oil, residual fuel oil or any refined petroleum product, as that last term is defined in section 3(5) of the Emergency Petroleum Allocation Act of 1973.

"Powerplant" means a fossil-fuel fired steam electric generating unit that produces electric power for purposes of sale or exchange, and includes any person who owns, leases, operates or controls any such unit.

"Primary energy source" means, with respect to a powerplant or major fuel burning installation that utilizes a fossil-fuel, the fuel that is or will be used for all purposes except for the minimum amounts required for start-up, testing, flame stabilization and control, and process fuel use; and except, with regard to powerplants or major fuel burning installations issued prohibition orders that also are issued delayed compliance order by EPA in accordance with section 113 of the Clean Air Act (42 U.S.C. 7413), for such minimum amounts of fuel required to enable such powerplant or major fuel burning installation to comply with applicable primary standard conditions prescribed by EPA in accordance with 40 CFR 55.04. *Provided*, Such minimum amounts of fuel may be used only when such primary standard conditions include the utilization of intermittent control systems and only during such temporary periods as use of such minimum amounts is absolutely necessary to meet the terms of the primary standard condi-

tions relating to use of intermittent control systems.

"Proceeding" means the process and activity, and any part thereof, instituted by the DOE, either on its initiative or in response to an application submitted by a powerplant or major fuel burning installation, that may lead to an action by DOE.

"Process fuel use" means that fuel use for which alternate fuels are not technically feasible such as in applications requiring precise temperature controls and precise flame characteristics.

"Prohibition order" means a directive issued by DOE pursuant to sections 2 (a) and (b) of ESECA (15 U.S.C. 792 (a), (b)) that prohibits a powerplant or major fuel burning installation from burning natural gas or petroleum products as its primary energy source.

"Stationary source fuel or emission limitation" means any emission limitation, schedule or timetable of compliance, or other requirement, which is prescribed under the Clean Air Act (other than sections 113, 111(b), 112, or 303 (42 U.S.C. 7413, 7411, 7412, and 7603 respectively)) or contained in an applicable implementation plan (other than a requirement imposed under authority described in section 110(a)(2)(F)(v) of such Act (42 U.S.C. 7410(a)(2)(F)(v))), and which limits, or is designed to limit, stationary source emissions resulting from combustion of fuels, including a prohibition on, or specification of, the use of any fuel of any type, grade, or pollution characteristic.

Throughout this part the use of a word or term in the singular shall include the plural and the use of the male gender shall include the female gender.

§ 305.7 Effective date of prohibition orders.

The prohibitions stated in a prohibition order issued to a powerplant or major fuel burning installation shall not become effective (a) until the Administrator of EPA certifies to DOE pursuant to section 112(b) of the Clean Air Act Amendments of 1977 (Pub. L. 95-95) the earliest date that the powerplant or installation will be

able to burn coal and to comply with all applicable requirements of section 113 of the Clean Air Act (42 U.S.C. 7413), and (b) until DOE has taken the actions described in § 305.9 and has served the affected powerplant or major fuel burning installation an NOE, as provided in §§ 303.10(b) and 303.37(b) of this chapter. Such order shall not be effective during any period certified by the Administrator of EPA under section 113(d) of the Clean Air Act (42 U.S.C. 7413(d)).

§ 305.8 Modification and rescission of prohibition orders.

(a) DOE may modify or rescind any prohibition order at any time. A modification or rescission of a prohibition order may be the result of DOE action taken on its own initiative or at the conclusion of proceedings initiated by an application. Modification or rescission of prohibition orders that are not yet effective will be undertaken only on DOE's initiative.

(b) Notice of intention to modify or rescind any prohibition order shall be published in the FEDERAL REGISTER. The notice shall provide interested persons with a period of no less than 10 days in which to make written presentation of data, views and arguments regarding such action.

§ 305.9 Consideration of environmental impact.

Prior to the issuance of an NOE to any powerplant or major fuel burning installation, DOE shall perform an analysis of the environmental impact of the issuance of the NOE. That analysis shall result in either (1) issuance of a declaration that a specific prohibition order or group of prohibition orders will not, if made effective by issuance of an NOE be likely to have a significant impact on the quality of the human environment, or (2) preparation of an environmental impact statement covering significant site-specific impacts that are likely to result from a specific prohibition order or group of prohibition orders and that have not been adequately discussed in the programmatic environmental impact statement prepared in accordance with section 102(2)(C) of the Na-

tional Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332) and Part 1021 of this chapter, or in other official documents made publicly available during the DOE proceedings in connection with issuance of a prohibition order or by EPA in the course of its determinations with respect to certification pursuant to section 112(b) of the Clean Air Act Amendments of 1977 (Pub. L. 95-95), or otherwise made available to the public. If DOE prepares an environmental impact statement covering significant site-specific impacts from a prohibition order or group of such orders, the statement shall be prepared and published for comment in accordance with section 102(2)(C) of NEPA and Part 1021 of this chapter and prior to issuance of an NOE. Interested person may request a public hearing pursuant to Subpart N of this part to comment on the contents of a draft environmental impact statement published pursuant to this paragraph.

§ 305.10 Procedures.

(a) All applications for modification or rescission of a prohibition order shall be filed with DOE in accordance with Subpart J of Part 303 of this chapter.

(b) Procedures pertaining to the modification or rescission of a prohibition order and the appeal of such order (e.g., notice, hearings, content of order, process of evaluation, appeal) are stated in Subparts J and H respectively, of Part 303 of this chapter.

PART 320—UNIVERSITY COAL RESEARCH LABORATORIES PROGRAM

Sec.

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- 320.20 UCL program termination.

AUTHORITY: Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, Title VIII, as amended by the Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, Title VI, sec. 604; Department of Energy Organization Act, Pub. L. 95-91, Sec. 644, et seq.

SOURCE: 44 FR 25599, May 1, 1979, unless otherwise noted.

§ 320.1 Purpose and scope.

This part contains the requirements for the conduct of a University Coal Research Laboratories Program, the selection of thirteen institutions of higher education at which the laboratories are to be located and grant awards to establish the laboratories as authorized by Title VIII, Section 801 of the Surface Mining Control and Reclamation Act of 1977 (Pub. L. 95-87), as amended.

§ 320.2 Definitions.

As used in this chapter, the term—

(a) "Abundant coal reserves" means a state with a *demonstrated coal reserve base* in excess of 1.5 billion tons.

(b) "Act" means Title VIII of the Surface Mining Control and Reclamation Act of 1977, Pub. L. 95-87, as amended by the Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, Title VI, Sec. 604.

(c) "Coal characterization research" means a program of research to advance knowledge and understanding of the physical and chemical characteristics of different types of coal and the correlation of these characteristics to the behavior of coal in various production, handling and utilization processes. The research program also may be concerned with the development of new techniques and procedures for the characterization of coals.

(d) "Coal research" means research that will advance efforts to expand the use of coal as a source of energy. The research may include, but not necessarily be restricted to, investiga-

tions relating to resource development, mining, beneficiation, direct utilization, conversion, mine safety, environmental and health effects, transportation, and institutional impacts. The research may relate to coal of any rank and grade.

(e) "DCE" means the Department of Energy.

(f) "DOE selection official" means the Secretary of Energy, or his designee, vested with the final authority and responsibility to select and designate the University Coal Research Laboratories.

(g) "Education and training," for purposes of the UCL Program, includes the training of advanced students through participation in coal research and coal research seminars. Education and Training also includes limited activities relating to the dissemination of UCL research information through continuing education or related programs and the improvement or upgrading of academic courses on coal-related subjects as a direct result of UCL research activities.

(h) "Institution of higher education" means a four-year university or college with established programs in several areas of coal research and related educational activities and masters and/or doctoral degree programs which must be accredited by the appropriate general regional accrediting agency or where appropriate, by recognized professional accrediting bodies in disciplines related to coal research. An institution of higher education for purposes of eligibility includes single institutions meeting the above qualifications, or a consortium or partnership of institutions which are collectively qualified. A consortium or partnership of institutions must clearly designate a "party" to serve as its agent for proposal submissions, award negotiations, technical reporting, fiscal reporting and audit requirements. In addition, multi-state consortia or partnerships, must name a "lead" institution and the location of the "lead" institution shall be considered the "home state" for purposes of meeting limitations of the Act with the further provision that a significant part of the UCL pro-

gram shall be conducted within the "home state."

(i) "Major coal provinces" means the division of the coal fields of the United States into coal provinces as determined by the U.S. Geological Survey (USGS). The USGS has determined the following coal provinces: Alaska, Eastern, Gulf, Interior, Northern Great Plains, Pacific, and Rocky Mountains. The following table further defines the "Major Coal Provinces" by listing all of the states which fall within each province regardless of the abundance of coal reserves. States meeting the abundant coal reserve criteria (in excess of 1.5 billion tons) are italicized:

(1) Alaska Province: *Alaska*.

(2) Eastern Province: *Alabama, Connecticut, Delaware, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Jersey, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia*.

(3) Gulf Province: *Alabama, Arkansas, Georgia, Florida, Kentucky, Louisiana, Mississippi, Missouri, Tennessee, Texas*.

(4) Interior Province: *Arkansas, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Wisconsin*.

(5) Northern Great Plains Province: *Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Wyoming*.

(6) Pacific Province: *Arizona, California, Idaho, Nevada, Oregon, Washington*.

(7) Rocky Mountains Province: *Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Texas, Utah, Washington, Wyoming*.

(j) "Operating expenses" includes such costs associated with the development and operation of an ongoing research and related education program as salaries and wages, fringe benefits, travel, publication, computer supplies, research equipment up to \$1,000 in value and other direct and indirect costs associated with the operation of a coal research laboratory.

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This item does not include costs associated with the construction of laboratory facilities and buildings, the acquisition and installation of major equipment or for new program startup expenses.

(k) "State" means the States of the United States.

§ 320.3 Establishment of program.

There is established a University Coal Research Laboratories Program under the direction of the Office of Energy Research of DOE for the purposes of expanding research on coal and the training of advanced students and others through participation in such research. This program shall consist of thirteen coal research laboratories located at institutions of higher education which have the potential for and are capable of establishing and operating such a facility. At least ten of the network of thirteen authorized coal research laboratories will be located in States with abundant coal reserves. There will be at least one University Coal Research Laboratory designated in each of the seven coal provinces but not more than one in any State. The University Coal Research Laboratories Program will build upon and strengthen existing or potential coal-related research capabilities at the selected universities and will complement, but not duplicate or supplant, research on coal currently being conducted at universities.

§ 320.4 Program objectives.

The broad objectives of the University Coal Research Laboratories Program (hereafter referred to as the UCL Program) are as follows:

(a) The establishment of a network of coal research laboratories at institutions of higher education which are committed to conducting coal research;

(b) The stimulation of coal research in institutions of higher education;

(c) The training of advanced students and others through participation in coal-related research;

(d) The establishment of research programs for the characterization of coal in support of UCL research efforts; and

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(e) The promotion of exchange of coal research information.

§ 320.5 Functions of university coal research laboratories.

Within the scope of the UCL Program objectives, each UCL shall conduct a research program which addresses significant coal-related research problems and which provides coal research experience to advanced students and others. The coal research program shall build on existing or potential institutional capabilities and resources and focus a majority of the research effort in one or more programmatic research areas reflecting these institutional strengths. Each UCL coal research program shall represent a balance between research and training and, within institutional capabilities, shall address coal research problems of general and/or regional nature. To bring the broadest range of capabilities to bear on its research problems, each UCL is encouraged to establish collaborative research, where appropriate, through cooperative arrangements with other academic institutions, laboratories, industry or other organizations. Each UCL shall propose a program for coal characterization research to be conducted in support of its research activities. This research program may serve as a focal point for the exchange of information on coal characterization research needs and results with representatives of private industry engaged in coal research and characterization but shall not provide services in competition with commercial laboratories capable of offering these services, nor supplant or duplicate such services as are normally provided by commercial laboratories. Each UCL shall establish and maintain regular communication, as appropriate, with the public and private sectors, including State and local governments, the coal producing industry, coal users, the general public and other institutions and organizations concerned with the problems and issues of research on coal as a source of energy. Through such interactions, each UCL shall disseminate information on its research accomplishments

and seek inputs concerning research needs and problems.

§ 320.6 Management.

(a) The UCL Program shall be managed by a Program Director, University Coal Research Laboratories Program, located within the Office of Energy Research, DOE.

(b) Each UCL shall be managed by a director selected by the institution.

§ 320.7 Eligibility requirements.

(a) To be eligible to submit an application and be designated for participation in the UCL Program, the applicant must be an institution of higher education and have accredited masters and/or doctoral degree programs in disciplines related to ongoing and proposed areas of coal research and education. The institution must have experience in coal research, and expertise in several areas of coal research and the potential for, or currently active, outstanding programs in coal research. The institution must have the demonstrated capacity to establish and operate a coal research laboratory.

(b) To be eligible, an institution shall have or propose to establish such policies and procedures as will insure that the Federal share of funds made available under the UCL Program will be used to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available for the purposes of the activities proposed for the UCL and in no case supplant such funds.

(c) Only one proposal will be accepted from a single institution. An institution which is part of a consortium or partnership shall be subject to this restriction if that institution has been designated lead institution in a consortium or partnership proposal.

§ 320.8 Content of proposals.

(a) Institutions of higher education meeting the eligibility requirements as set forth in § 320.7, may submit a proposal in accordance with this regulation and the UCL Program Solicitation to compete for designation as a UCL and Federal financial assistance for approved UCL Programs. The Pro-

gram Solicitation will specify the number of copies of each proposal and the address of the DOE office where they should be sent.

(b) The proposal shall contain, but not necessarily be limited to the following information:

(1) A summary statement of institutional eligibility for the UCL Program.

(2) A summary of scope, quality and history of established coal research and education activities including ongoing coal research and education programs, faculty involvement, student participation, publications, facilities and equipment.

(3) A statement of goals and objectives of the proposed UCL.

(4) A description of the organizational structure and management proposed for the UCL.

(5) A summary of the general plan for research and education activities proposed for the UCL through FY 1984, including a summary of technical projects to be undertaken, investigators and facilities to be committed, involvement of advanced students, a program for coal characterization research, facility and equipment needs, levels and man-years of effort and projected budget requirements.

(6) Concise project proposals for each individual program activity proposed in the summary plan to permit separate scientific and technical peer review and evaluation of these projects.

(7) A cost-sharing plan which describes in general terms how the proposal plans to meet the cost-sharing requirements of the UCL program (See § 320.16, Cost Sharing) for the authorized duration of the UCL Program (See § 320.21, UCL Program Termination) and a certification of the source, availability and commitment of non-Federal funds to meet cost-sharing requirements for UCL program activities proposed for the first year.

(c) The contents of the proposal described under paragraph (b) of this section, shall be sixty pages or less in length, exclusive of appendices which shall include specific project proposals (paragraph (b)(6) of this section), supportive information concerning ongoing coal-related research and educa-

tion activities and other relevant information.

(d) Additional information on the format and content for proposals will be specified in a University Coal Research Laboratories Program Solicitation, notice of which shall be published in the *FEDERAL REGISTER*, and the *Commerce Business Daily*. The Program Solicitation will further specify the closing date for the submission of proposals. A minimum of 90 days will be provided for the preparation and submission of proposals.

(e) UCL proposals will be prepared in accordance with the requirements of the DOE Assistance Regulations, 10 CFR Part 600, (44 FR 12920, Mar 8, 1978).

[44 FR 25599, May 1, 1979, as amended at 44 FR 58900, Oct. 12, 1979]

§ 320.9 Evaluation and selection procedures.

(a) UCL Program proposals shall be subject to the following review and evaluation procedures:

(1) An initial review shall be conducted by the DOE Selection Panel, appointed by the DOE Source Selection Official, to determine if the proposing institution meets the eligibility requirements contained in § 320.7 and to determine if the proposal is complete as required by this regulation and the Program Solicitation.

(2) Proposals from institutions that do not meet the eligibility requirements or the requirements of the Program Solicitation shall be rejected.

(3) Proposals from institutions meeting the conditions of eligibility and the other application requirements shall be reviewed, evaluated, and ranked in accordance with the evaluation criteria (§ 320.11) by Technical Reviewers appointed by the DOE Selection Official from among qualified technical experts in areas related to coal research.

(4) Subsequent to the review and ranking of proposals, an analysis employing the selection criteria (§ 320.12) will be performed by the DOE Selection Panel.

(5) The DOE Selection Official, assisted by the DOE Selection Panel and based on the selection criteria, will designate thirteen institutions which

individually and collectively are considered to have the greatest potentiality for meeting the objectives of a balanced national UCL Program of coal research and research-related training.

(6) After designation of the UCL's, DOE will enter into negotiations with each UCL to select and establish the support levels for those project activities to be included in the UCL grant award.

(b) The DOE Selection Official shall announce the designated institutions at which University Coal Research Laboratories will be established and operated within 90 days of the closing date for the submission of proposals.

§ 320.10 Evaluation criteria.

(a) Proposals from institutions which meet the requirements of eligibility (§ 320.7) will be evaluated and ranked by DOE using criteria which may include, but not necessarily be limited to the following:

(1) *Understanding of objectives of UCL Program and functions of the UCL.* (i) Perceptions of coal related needs, problems and issues to be met through research and training.

(ii) Awareness of the state-of-the-art in the principal areas of coal research proposed for the UCL.

(iii) The relationship of the proposed research to and the differences from current work in the same field(s).

(iv) Institutional rationale for participation in the UCL Program including relevance to the various programs and missions of the institution.

(v) Relationship of proposed plan to the functions of a UCL as set forth in § 320.5.

(2) *Qualifications of eligible institution.* (i) Scope, quality, and history of established coal research and education programs such as ongoing research and education programs, faculty involvement, student participation, publications, facilities and equipment.

(ii) Potential for attracting qualified advanced students.

(iii) Qualifications of the investigators committed to the UCL Program.

(iv) Role and qualifications of UCL Director.

(v) Existing facilities and equipment to be committed to UCL programs.

(3) *Scientific and technical merit of the proposed Program.* (i) The quality of the proposed research.

(ii) The role of proposed research in the training of advanced students.

(iii) The degree to which the proposed research will advance scientific and technical understanding of the coal-related problem(s) under study.

(iv) The role of the coal characterization research program in support of proposed UCL research and education activities.

(v) Provisions for communicating research results and for interaction with various segments of the public and private sectors concerning UCL activities.

(4) *Program management plans.* (i) Demonstrated capability and experience in the administration of complex interdisciplinary and/or interinstitutional research programs comparable to a UCL.

(ii) Program management plan proposed for UCL.

(iii) Plans for managing research and training activities carried on in collaboration with other organizations and institutions.

(iv) Reasonableness and appropriateness of the proposed cost plan specifically for UCL program administration.

(v) Nature of institutional commitment to the UCL Program including provisions for institutional support, cost-sharing, program continuity and the relationship of the UCL to the overall academic mission of the institution.

(vi) Provisions for coordination between the UCL and, if present, a Mining and Mineral Resources Research Institute established and funded under provisions of Title VIII, Pub. L. 95-87, including program planning, organization, management, and avoidance of program duplication.

(5) *Fiscal management.* (i) The reasonableness and appropriateness of the total costs proposed for the UCL program including research, program operations, facilities, and equipment.

(ii) The justification presented for the major cost categories proposed (operating expenses, facilities, major equipment, etc.) with reference to § 320.14, *Limitations on the Use of Funds.*

(iii) Certification of cost-sharing to meet the specific requirements on laboratory operating expenses and cost-sharing proposed on facilities and equipment requests in the first program year.

(b) All eligible UCL proposals will be reviewed and evaluated with respect to the above-listed evaluation criteria.

[44 FR 25599, May 1, 1979, as amended at 44 FR 58900, Oct. 12, 1979]

§ 320.11 Selection criteria.

(a) In making the final selection of the institutions to be designated as the site of a UCL, the following criteria will be considered by the DOE Selection Panel:

(1) The actual ranking of the proposals with respect to the evaluation criteria.

(2) The relative need for research on coals of different types and qualities distributed within the various coal provinces.

(3) Geographic distribution of the applicants with respect to coal provinces, coal reserves, and the utilization of coal on a state and regional basis.

(4) The best overall mix of research specialties, educational potential, and geographic distribution as determined by DOE of coal research programs among those proposed by the designated UCL institutions.

(b) Criteria § 320.12(a) (2) through (4), of this part, are DOE programmatic criteria which DOE will use in the selection of proposals for award and do not reflect on any individual proposal. These criteria will be used by DOE to insure the appropriate mix of awards which meet the overall UCL Program objectives.

§ 320.12 Program implementation.

Subsequent to the designation of the UCL institutions and subject to the availability of UCL Program funds, the UCL Program Office shall initiate the grant award process. Funding of designated UCL's will depend on the funding requested and the nature of the proposed program by each UCL, the best mix of research and educational activities among the UCL's and the availability of appropriated funds to the UCL Program with the amount

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of the grant being determined through negotiation as cited above in § 320.10. In developing specific funding levels for the initial program year, consideration will also be given to the current capabilities and future potential of each individual UCL. All awards will be subject to the availability of appropriated funds.

§ 320.13 Limitations on the use of funds.

(a) No UCL may receive more than the following total amount of Federal funds:

(In millions of dollars)	
	Limit
Construction and fixed equipment	\$4.0
Movable equipment	1.5
Start-up expenses	0.5
Program operations (annual)	1.5

¹ Federal share shall not exceed 50 percent of the total operating costs for any fiscal year.

(b) The Director of the UCL Program will determine the amount of funds to be advanced to each designated UCL for the initial grant year based on estimates of amounts required to conduct all or parts of the proposed program as agreed to through negotiation with the UCL. Depending on levels of appropriation, the following priorities may apply in the allocation of UCL funds: (1) Research program operating expenses; (2) acquisition of movable equipment; and (3) construction of facilities, acquisition of related fixed equipment and start-up costs.

§ 320.14 Program continuation.

(a) The budget levels for subsequent year funding of a UCL beyond the initial year will be agreed to for planning purposes during the negotiation of the initial UCL grant. Specific funding levels for subsequent years will be contingent upon (1) technical performance, (2) proposed continuation program plans and (3) availability of appropriations to the UCL Program. A renewal proposal will be required of each UCL at a time and in a format mutually agreed to between DOE and the UCL.

(b) Technical performance and technical program plans of each UCL will be reviewed by qualified review panels

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at intervals to be specified by the UCL Program Office.

(c) The UCL Program Office will determine the scope and level of continued support to each UCL based on program reviews and the allocation of available UCL Program funds.

(d) Subsequent year support to a UCL may be refused at the discretion of the DOE UCL Program Office based, for example, on past performance; failure to agree on a mutually acceptable continuation program plan; or the level of available UCL Program funds. In such instances, terminal funding at a reduced level for one (1) year may be authorized by the UCL Program Office.

§ 320.15 Cost sharing.

(a) DOE is authorized to make grants to pay a Federal share of the costs of establishing and maintaining a UCL, including construction of such facilities as may be necessary, to those institutions of higher education designated in the UCL Program.

(b) The Federal share of UCL operating expenses for any fiscal year shall not exceed 50 per centum of the cost of operation of a UCL.

(c) Cost-sharing stipulated by the Act will be governed in accordance with prevailing OMB regulation, FMC 73-3, "Cost-Sharing on Federal Research" and Circular A-110 "Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations." Cost participation may be accomplished by a contribution to any of the cost elements of research projects supported under specific UCL awards, either direct or indirect costs; provided that such costs would otherwise be allowable in accordance with the cost principles authorized in OMB Circular A-21 (dated February 26, 1979), and that the costs are not charged to the Federal government under any other grant or contract. Cost-sharing may vary in amount from project to project within a UCL but the aggregate of cost-sharing for the operating expenses portion of the UCL program must be of equivalent value and match or exceed expenditures of DOE funds

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in any given grant period. The grantee contributions to the costs of operating the UCL may be in any form, including cash or in-kind contributions (the value of which is determined by DOE), from the institution or third parties, and for any category costs, direct or indirect: *Provided*, They are non-Federal and are not otherwise counted as cost-sharing on other Federal projects. Education and training activities must be directly included as one of the operating expense functions of the UCL in order that such activities may be considered as part of the proposer's cost-share. Institutions or organizations participating in collaborative projects of the UCL under a subgrant may make cost-sharing contributions which meet the cost-sharing requirement. Grantees must maintain adequate cost-sharing records as well as records of all expenditures.

§ 320.16 General requirements.

(a) Policies for and administrative requirements of the UCL research awards will be in accordance with FMC 73-7 (dated December 19, 1973); OMB Circular A-110 (dated July 30, 1976), and the DOE Assistance Regulations Subparts A and B (dated March 8, 1979).

(b) Each grant under this part shall require that a recipient of support under the UCL program submit a final written report of activities supported in whole or in part by Federal funds made available under the program.

§ 320.17 Patents, data, and copyrights.

Each grant under the program shall be governed by the provisions of Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. 5908, with regard to patent and any agreements by DOE to waive title to inventions that may be made under the program

shall be pursuant to 41 CFR Part 9-9. The rights-in-data provisions included in the grant shall be as required by 10 U.S.C. 600.82(c).

§ 320.18 Reporting and dissemination of information.

(a) Each designated UCL shall submit semiannually brief technical progress reports and annual program performance reports to the DOE UCL Program Office. The annual report shall be submitted concurrent with the renewal proposal and shall include a description of the activities conducted at the UCL and an evaluation of the success of such activities and such other information as may be required by DOE.

(b) UCL financial and budget reports will be prepared in accordance with OMB Circular A-110, Attachment G, Financial Reporting Requirements.

(c) The UCL institutions and DOE shall disseminate to the public in an appropriate manner information on coal research findings resulting from program activities of the UCL program. Prompt dissemination of UCL research results to the scientific and technical community shall be encouraged.

§ 320.19 Proposal information.

Information contained in proposals submitted in response to the subsequent UCL Program Solicitation shall be treated in accordance with DOE-PR 9-3.150.

§ 320.20 UCL program termination.

The UCL Program is authorized to continue until the end of fiscal year 1984. Continuation of the program will depend on the extension of the authorizing legislation and the availability of appropriated funds.

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Inspector General, Office of	7, XXXI
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Packers and Stockyards Administration	9, II
Rural Electrification Administration	7, XVII
Rural Telephone Bank	7, XVI
Secretary of Agriculture, Office of	7, Subtitle A
Soil Conservation Service	7, VI
Air Force Department	32, VII
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Federal Inspector	10, XV
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AMTRAK	49, VII
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Appalachian Regional Commission	5, IX
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Central Intelligence Agency	32, XIX
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Coast Guard	33, I; 46, I, III; 49, IV
Commerce Department	44, IV
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Economic Analysis, Bureau of	15, VIII
Economic Development Administration	13, III
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Industrial Economics, Bureau of	15, VI
International Trade Administration	15, III; 19, III
National Bureau of Standards	15, II
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Postsecondary Education, Office of	34, VI
Secretary of Education, Office of	34, Subtitle A
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Vocational and Adult Education, Office of	34, IV
Educational Research and Improvement, Office of	34, VII
Elementary and Secondary Education, Office of	34, II
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Federal Election Commission	11, I
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Federal Mediation and Conciliation Service	29, XII
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Federal Railroad Administration	49, II
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Fishery Conservation and Management	50, VI
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Food and Nutrition Service	7, II
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Public and Indian Housing, Office of Assistant Secretary for	24, II, VIII, X, XX
Solar Energy and Energy Conservation Bank	45, XIII
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International Regulatory Agencies (Fishing and Whaling)	50, III
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Interstate Commerce Commission	49, X
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National Capital Planning Commission	1, IV
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National Marine Fisheries Service	50, II, IV
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United States Customs Service	19, I
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Redesignations and Editorial Changes

The following document published at 44 FR 37938, June 29, 1979, affects regulations appearing in Chapter II of this volume.

REMOVED MATERIAL

1. The following special rules have been deleted from the 1979 revision of the CFR because internal provisions indicate that they have expired.

Special rule No.	Placement in 10 CFR 200—End revision	Period of time covered by special rule
2.....	211, Sub. A, P. 158.....	For the month of July 1976.
3.....	211, Sub. A, P. 158.....	For the months of August 1976 through Mar. 31, 1977.
5.....	211, Sub. A, P. 160.....	Through Mar. 31, 1977; and through Mar. 31, 1978.
6.....	211, Sub. A, 44 FR 3489; Jan. 17, 1979.....	Through Mar. 31, 1979.
1.....	211, Sub. C, P. 191.....	Commencing Feb. 1, 1974; and month of May 1974.
2.....	211, Sub. C, P. 192.....	Quarter commencing Sept. 1, 1974.
3.....	211, Sub. C, P. 193.....	Months of Nov. and Dec. 1974, and Jan. and Feb. 1975.
5.....	211, Sub. C, P. 195.....	Quarter commencing Sept. 1, 1975 ... is not extended beyond Nov. 15, 1975.
8.....	211, Sub. C, P. 196.....	For the months of Feb. and Mar. 1977.
9.....	211, Sub. C, P. 196.....	Quarter ... commencing June 1, 1977; and—special allocation ... for month of Sept. 1977; also allocation period commencing Oct. 1, 1977.
1.....	211, Sub. D, P. 201.....	Remain in effect thru Mar. 31, 1977.
2.....	211, Sub. D, P. 203.....	Remain in effect thru Mar. 31, 1977.
1.....	212, Sub. F, P. 307.....	For the months Jan. thru Mar. 1977.

2. Part 500, entitled "Mandatory Gasoline and Diesel Fuel Rationing Regulations," was established on January 28, 1977, at 42 FR 4819. These regulations were issued subject to the approval by a resolution by each House of Congress in accordance with the procedures specified in section 552 of the Energy Policy and Conservation Act (Pub. L. 94-163).

Since Congressional approval was never granted, Part 500 is being removed from the CFR.

3. In § 212.72, the definitions of "Adjusted decontrol base production level," "Decontrol base production level," and "Decontrolled old crude petroleum" were added on July 29, 1975, at 40 FR 31747. These regulations were issued subject to Congressional review according to the procedures specified under section 4(g)(2) of the Emergency Petroleum Allocation Act of 1973.

Since Congress did not approve this amendment, § 212.72 is amended by removing these definitions.

APPENDIX HEADINGS

The headings of the appendices in this Chapter are being editorially amended. The intent of these changes is to—

1. Create a uniform system of designation for appendices in this title;
2. Indicate what the material in the appendix is appended to; and
3. Provide a short, descriptive subject heading for each appendix.

The amended headings read as follows:

Old	New
Part 205: Appendix II—Guidelines for the Disposition of Requests for Exceptions from Part 213.	Appendix A to Subpart D of Part 205—Disposition of Requests for Exceptions from Part 213.
Part 208: Appendix—Summary Sheet to Accompany Draft and Final Environmental Impact Statements.	Appendix A to Part 208—Environmental Impact Statement Summary Sheet.
Part 211: Appendix—Guidelines for the Allocation of Propane and Other NGLs for Gas Utility and Gas Transmission Company Use. Appendix A—Forms and Instructions.	Appendix A to Subpart D of Part 211—Allocation Guidelines for Propane and Other Natural Gas Liquid Products for Gas Utility and Transmission Company Use. Appendix A to Subpart L of Part 211—Reporting Forms and Instructions.
Part 212: Appendix—Schedule of No. 9 of monthly price adjustments effective Dec. 1, 1977.	Appendix A to Subpart D of Part 212—Monthly Price Adjustments from February 1978 through August 1979.
Part 430: Appendix A1—Uniform test method for measuring the energy consumption of electric refrigerator-freezers. Appendix B—Uniform test method for measuring the energy consumption of freezers. Appendix C—Uniform test method for measuring the energy consumption of dishwashers. Appendix D—Uniform test method for measuring the energy consumption of clothes dryers. Appendix E—Uniform test method for measuring the energy consumption of water heaters. Appendix F—Uniform test method for measuring the energy consumption of room air conditioners. Appendix G—Uniform method for measuring the energy consumption of unvented home heating equipment. Appendix H—Uniform test method for measuring the energy consumption of television sets. Appendix I—Uniform test method for measuring the energy consumption of conventional ranges; conventional cooking tops; conventional ovens; microwave ovens and microwave/conventional ranges. Appendix J—Uniform test method for measuring the energy consumption of automatic and semi-automatic clothes washers. Appendix K1—Uniform test method for measuring the energy consumption of central system humidifiers. Appendix K2—Uniform test method for measuring the energy consumption of room humidifiers. Appendix L—Uniform test method for measuring the energy consumption of dehumidifiers. Appendix M—Uniform test method for measuring the energy consumption of central air conditioners. Appendix N—Uniform test method for measuring the energy consumption of furnaces. Appendix O—Uniform test method measuring the energy consumption of vented home heating equipment.	Appendix A to Subpart B of Part 430—Uniform test method for measuring the energy consumption of electric refrigerators and electric refrigerator-freezers. Appendix B to Subpart B of Part 430—Uniform test method for measuring the energy consumption of freezers. Appendix C to Subpart B of Part 430—Uniform test method for measuring the energy consumption of dishwashers. Appendix D to Subpart B of Part 430—Uniform test method for measuring the energy consumption of clothes dryers. Appendix E to Subpart B of Part 430—Uniform test method for measuring the energy consumption of water heaters. Appendix F to Subpart B of Part 430—Uniform test method for measuring the energy consumption of room air conditioners. Appendix G to Subpart B of Part 430—Uniform method for measuring the energy consumption of unvented home heating equipment. Appendix H to Subpart B of Part 430—Uniform test method for measuring the energy consumption of television sets. Appendix I to Subpart B of Part 430—Uniform test method for measuring the energy consumption of conventional ranges; conventional cooking tops; conventional ovens; microwave ovens and microwave/conventional ranges. Appendix J to Subpart B of Part 430—Uniform test method for measuring the energy consumption of automatic and semi-automatic clothes washers. Appendix K1 to Subpart B of Part 430—Uniform test method for measuring the energy consumption of central system humidifiers. Appendix K2 to Subpart B of Part 430—Uniform test methods for measuring the energy consumption of room humidifiers. Appendix L to Subpart B of Part 430—Uniform test method for measuring the energy consumption of dehumidifiers. Appendix M to Subpart B of Part 430—Uniform test method for measuring the energy consumption of central air conditioners. Appendix N to Subpart B of Part 430—Uniform test method for measuring the energy consumption of furnaces. Appendix O to Subpart B of Part 430—Uniform test method for measuring the energy consumption of vented home heating equipment.
Part 450: Appendix B—Heating zones for energy measures. Appendix C—Cooling zones for energy measures. Appendix A—Energy Price Projections. Appendix B—Discount Factors (Discounting Rate of 10 Percent). Appendix C—Factors to adjust future principal and interest payments to base year equivalent values.	Appendix A to Subpart D of Part 450—Heating zones for energy measures. Appendix B to Subpart D of Part 450—Cooling zones for energy measures. Appendix A to Part 450—Energy Price Projections. Appendix B to Part 450—Discount Factors (Discounting Rate of 10 Percent). Appendix C to Part 450—Factors to adjust future principal and interest payments to base year equivalent values.
Part 725: Appendix A—Categories of Restricted Data Available (Including Scope Notes for Each Category). Appendix B—ERDA's Operations Offices Geographical Areas of Responsibilities.	Appendix A to Part 725—Categories of Restricted Data Available. Appendix B to Part 725—ERDA's Operations Offices and Geographical Areas of Responsibilities.

Redesignation Table

Old	New
Part 861: Appendix A—Perimeter description of the Energy Research and Development Administration's Nevada Research and Development Administration's Nevada test site in the State of Nevada.	Appendix A to Part 861—Perimeter Description of ERDA's Nevada Test site.

STANDBY REGULATIONS

I. Standby Regulations have been published as special rules in 10 CFR Chapter II. Because of the relationship to existing regulations, they must be separate from the remaining special rules and given a unique, identifiable designation. We are designating the standby regulations as follows:

Old	New
Special Rule 1 to Part 210.....	Standby regulation 210-1.
Special Rule 10 to Part 211, Subpart C.....	Standby regulation 211-1.
Special Rule 1 to Part 211.....	Standby regulation 211-2.
Special Rule 1 to Part 212, Subpart L.....	Standby regulation 212-1.
Special Rule 1 to Part 212.....	Standby regulation 212-2.

II. The text of the standby regulations are carried in an Appendix A to the Part where they appear. For example, Appendix A to Part 211 contains Standby Regulations 211-1 and 211-2. The full text of any document affecting a standby regulation will be carried with that regulation.

III. A series of bridges or finding aids have been developed to connect the current text of the CFR to the provisions of the Standby Regulation that potentially amends the CFR. These devices—

1. Make the user aware of the existence of alternative text;
2. Connect the CFR section to the standby regulation potentially affecting it; and

3. Indicate activated provisions of any activated standby regulation.

These finding aids include—

1. A two-part table to 10 CFR Chapter II indicating published standby regulations; and
2. A note to any potentially affected CFR Section indicating the standby regulation potentially affecting it.

The tables would appear as follows:

DOE/ERA STANDBY REGULATIONS

TABLE 1

Standby regulation	Subject	FR
210-1.....	Standby product price and allocation regs.....	44 FR 3936, Jan. 18, 1979.
211-1.....	Standby mandatory crude oil allocation and refinery yield control programs.....	44 FR 3423, Jan. 16, 1979.
211-2.....	Standby product allocation regs.....	44 FR 3936, Jan. 18, 1979.
212-1.....	Mandatory allocated crude oil pricing rule.....	44 FR 3427, Jan. 16, 1979.
212-2.....	Standby product price regs.....	44 FR 3942, Jan. 18, 1979.

TABLE 2

Section affected	Standby regulation
210.35.....	210-1
211.2.....	211-2
211.9.....	211-2

TABLE 2—Continued

Section affected	Standby regulation
211.10.....	211-2
211.12.....	211-2
211.13.....	211-2

TABLE 2—Continued

Section affected	Standby regulation
211.17	211.-2
211.26	211.-2
211.62	211.-1
211.66	211.-1
211.71	211.-1
211.102	211.-2
211.105	211.-2
211.106	211.-2
211.122	211.-2
211.123	211.-2
211.125	211.-2
211.142	211.-2
211.143	211.-2
211.144	211.-2
211.145	211.-2

TABLE 2—Continued

Section affected	Standby regulation
211.146	211.-2
211.147	211.-2
211.162	211.-2
211.163	211.-2
211.166	211.-2
211.167	211.-2
211.182	211.-2
211.183	211.-2
211.185	211.-2
211.186	211.-2
211.202	211.-2
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The notes to each section that could be affected by a standby regulation read as follows.

§ 211.2 Relationship of subparts.

Unless otherwise specified in Subparts D through K of this part, the general provisions set forth in this subpart apply to the mandatory allocation of all allocated products.

NOTE: The provisions of this section may be affected by Standby Regulation 211-2. Standby Regulation 211-2 appears in Appendix A to Part 211. For the convenience of the user, a table listing all Standby Regulations and sections affected appears at the end of this Chapter.

SPECIAL RULES

There are four Special Rules in 10 CFR Chapter II which are not standby regulations and which are still in effect. They are—

1. Special Rule No. 7 to Part 211, Subpart A—44 FR 18643; March 29, 1979.
2. Special Rule No. 8 to Part 211, Subpart A—44 FR 24542; April 26, 1979.
3. Special Rule No. 9 to Part 211, Subpart A—44 FR 28616; May 15, 1979.
4. Special Rule No. 2 to Part 212, Subpart F—44 FR 9375; February 13, 1979.

These Special Rules amend or supplement codified regulations. They are normally issued on an emergency basis and effective for a short period of time. The text of any Special Rule currently in effect is carried as Appendix A to the Subpart where they appear.

List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations which were made by documents published in the Federal Register since Title 10, Chapter II was established at 39 FR 744, January 12, 1974, are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters and parts as well as sections for revisions.

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